

2527
No. 11878

United States
Circuit Court of Appeals
For the Ninth Circuit

JENNIE WUCHNER,

Appellant.

vs.

GEORGE T. GOGGIN, Trustee in Bankruptcy of
the ESTATE OF CHARLES E. HILL, Doing
Business as HILL MACHINE TOOLS,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

APR 27 1948

PAUL P. O'BRIEN,

CLERK

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Amended Petition for Order to Show Cause re Jennie Wuchner.....	15
Answer of Jennie Wuchner to Amended Peti- tion of Charles E. Hill.....	22
Appeal:	
Certificate of Clerk to Transcript of Rec- ord on.....	72
Corrections to Designation of Contents of Record on.....	67
Designation of Contents (DC) of Record on	64
Notice of.....	63
Order Extending Time for Docketing.....	72
Points to Be Relied Upon by Appellant on	161
Application for Additional Time to File Tran- script of Record and Docketing of Action in Circuit Court of Appeals.....	71
Application for Order to Certify Original Ex- hibits and Transcripts to Circuit Court of Appeals	69
Certificate of Clerk to Transcript of Record on Appeal	72
Corrections to Designation of Contents of Rec- ord on Appeal.....	67

INDEX	PAGE
Designation of Contents (DC) of Record on Appeal	64
Findings of Fact, Conclusions of Law and Order re Jennie Wuchner.....	34
Conclusions of Law.....	42
Findings of Fact.....	36
Order	44
Involuntary Petition in Bankruptcy.....	2
Memorandum in re Trustee vs. Wuchner.....	25
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	63
Order Denying Petition for Review.....	62
Order Extending Time for Docketing Appeal..	72
Order for Transmittal of Original Exhibits, etc.	70
Order of Adjudication.....	8
Order of General Reference.....	7
Order to Show Cause re Jennie Wuchner.....	21
Petition for Review of Referee's Order by Judge	46
Points to Be Relied Upon by Appellant on Appeal	161
Referee's Certificate on Petition for Review of Order in re Jennie Wuchner.....	9
Reporter's Transcript of Hearing on Order to Show Cause by George T. Goggin, Trustee, vs. Jennie Wuchner, 6/19/46.....	74

INDEX

PAGE

Reporter's Transcript of Hearing on Order to Show Cause by George T. Goggin, Trustee, v. Jennie Wuchner, et al., 11/1/46.....	96
Exhibits for Trustee:	
No. 1—Agreement for Sale of Real Estate	96
2—Notice to Chas. E. Hill.....	101
3—Copy Letter 6/28/46 with Check for \$5,035.43.....	102
4—Letter 2/14/46 re Escrow No. 32, etc., /s/ Mrs. Jennie Wuchner	115
5—Letter 2/11/46 re Escrow No. 32, etc., /s/ Frank Bruno and Teddy Berg.....	136
Exhibit for Wuchner:	
No. 1—Notice to Charles E. Hill.....	109
Witnesses for Respondent:	
Heffren, M. J.	
—direct	141
Witnesses for Trustee:	
Hill, Mrs. Dora M.	
—direct	139, 147
Poyet, Henry F.	
—direct	110
—cross	127
—redirect	129
Respondent's Objections to the Trustee's Pro- posed Findings of Fact, Conclusions of Law and Order re Jennie Wuchner.....	27

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

WILLIAM W. BEARMAN,
RAYMOND B. McCONLOGUE,
1680 N. Vine St.,
Hollywood 28, Calif.

For Appellee:

MARTIN GENDEL,
607 James Oviatt Bldg.,
617 S. Olive St.,
Los Angeles 14, Calif. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States for the
Southern District of California, Central
Division

No. 44347-W

In the Matter of
CHARLES E. HILL, Doing Business as HILL
MACHINE TOOLS,

Alleged Bankrupt.

INVOLUNTARY PETITION IN
BANKRUPTCY

To the Honorable Judges of the District Court of
the United States, Southern District of Cali-
fornia, Central Division:

Come now your petitioners, South Bay Daily
Breeze, Chet's Service Station and Herbert Al-
bright, and respectfully represent as follows:

I.

That Charles E. Hill is an individual doing busi-
ness at 732 North Pacific Avenue, Redondo Beach,
County of Los Angeles, State of California, under
the fictitious name of Hill Machine Tools, within
the above judicial district for a longer period of
the six months preceding the filing of this petition
than in any other judicial district.

II.

That said alleged bankrupt is an individual who
could become a bankrupt under Section 4 of the
Bankruptcy Act, and is not a Municipal, railroad,
insurance or banking corporation, or a building and
loan association. [2]

III.

That the nature of the business conducted by the alleged bankrupt is the operation of a machine shop.

IV.

That the said alleged bankrupt owes debts in an amount of more than \$1,000.00.

V.

That your petitioners are three of the creditors of the alleged bankrupt having provable claims against the alleged bankrupt, fixed as to liability and liquidated in amount, and in a total sum in excess of \$500.00, with no security for the same, your petitioners being unsecured general creditors; that the nature and amount of your petitioners' claims are as follows:

(a) That the alleged bankrupt is indebted to South Bay Daily Breeze on an open book account for services, in the sum of \$69.12;

(b) That the alleged bankrupt is indebted to Chet's Service Station for goods, wares and merchandise in the sum of \$215.13;

(c) That the alleged bankrupt is indebted to Herbert Albright for auditing services in the sum of \$240.00.

VI.

That within four months next preceding the filing of this petition, and while insolvent, the alleged bankrupt still being insolvent, the said alleged bankrupt committed an act of bankruptcy in that he

suffered and permitted an alleged creditor, Clifton A. Hix, to file suit in the Los Angeles Municipal Court in action No. 751312, and through this legal proceeding to obtain a lien upon his property by virtue of an attachment, and the said lien has not been vacated or discharged within thirty days from the date of the commencement thereof, and more than thirty days have elapsed and there is still a keeper in possession of the [3] physical property of the alleged bankrupt.

Wherefore your petitioners pray that service of this petition with a subpoena may be made upon said Charles E. Hill, doing business as Hill Machine Tools, as provided in the Act of Congress relating to bankruptcy, and that he may be adjudged a bankrupt within the purview of said Act.

Dated this 1st day of April, 1946.

SOUTH BAY DAILY BREEZE,

By /s/ J. F. MOORE,
Manager.

CHET'S SERVICE STATION,

By /s/ C. C. HARRINGTON,
Owner.

/s/ HERBERT ALBRIGHT,
Petitioning Creditors.

GENDEL AND SHERMAN,

By /s/ MARTIN GENDEL,
Attorneys for Petitioning
Creditors. [4]

Southern District of California,
State of California,
County of Los Angeles—ss.

J. F. Moore, being first duly sworn, deposes and says: That he is the B manager of South Bay Daily Breeze, one of the petitioning creditors in the above-entitled proceeding; that he has read the foregoing Involuntary Petition in Bankruptcy and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters that he believes it to be true.

/s/ J. F. MOORE.

Subscribed and sworn to before me this 3rd day of April, 1946.

/s/ GLENN W. WOOD,

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires Oct. 20, 1947.

Southern District of California,
State of California,
County of Los Angeles—ss.

C. C. Harrington, being first duly sworn, deposes and says: That he is the owner of Chet's Service Station, one of the petitioning creditors in the above-entitled proceeding; that he has read the foregoing Involuntary Petition in Bankruptcy and knows the contents thereof; that the same is true of his own knowledge except as to the matters

therein stated on his information and belief, and as to those matters that he believes it to be true.

/s/ C. C. HARRINGTON.

Subscribed and sworn to before me this 4th day of April, 1946.

/s/ J. F. MOORE,

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires April 2, 1949. [5]

Southern District of California,
State of California,
County of Los Angeles—ss.

Herbert Albright, being first duly sworn, deposes and says:

That he is one of the petitioning creditors in the above-entitled proceeding; that he has read the foregoing Involuntary Petition in Bankruptcy, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters that he believes it to be true.

/s/ HERBERT ALBRIGHT.

Subscribed and sworn to before me this 4th day of April, 1946.

/s/ J. F. MOORE,

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires April 2, 1949.

[Endorsed]: Filed April 5, 1946. [6]

[Title of District Court and Cause.]

ORDER OF GENERAL REFERENCE

At Los Angeles, California, in said district on the 5th day of April, 1946.

Whereas, a petition was filed in this court on the 5th day of April, 1946, against Charles E. Hill, dba Hill Machine Tools, alleged bankrupt above named, praying that he be adjudged bankrupt under the Act of Congress relating to bankruptcy, and good cause now appearing therefor;

It is ordered that the above-entitled proceeding be, and it hereby is, referred to Benno M. Brink, Esq., one of the referees in bankruptcy of this court, to take such further proceedings therein as are required and permitted by said Act, and that the said Charles E. Hill, dba Hill Machine Tools, shall henceforth attend before said referee and submit to such orders as may be made by him or by a judge of this court relating to said bankruptcy.

/s/ PAUL J. McCORMICK,
District Judge.

[Endorsed]: Filed April 5, 1946. [7]

[Title of District Court and Cause.]

ORDER OF ADJUDICATION

At Los Angeles, in said district, on the 1st day of May, 1946.

The petition of South Bay Daily Breeze, Chet's Service Station and Herbert Albright, filed on the 5th day of April, 1946, that Charles E. Hill, dba Hill Machine Tools, be adjudged a bankrupt under the Act of Congress relating to bankruptcy, having been heard and duly considered, and there being no opposition thereto;

It is adjudged that the said Charles E. Hill, dba Hill Machine Tools, is a bankrupt under the Act of Congress relating to bankruptcy.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

[Endorsed]: Filed May 2, 1946. [8]

In the District Court of the United States for
the Southern District of California, Central
Division

In Bankruptcy No. 44,347-W

In the Matter of

CHARLES E. Hill, dba HILL MACHINE
TOOLS,

Bankrupt.

Appearances:

William W. Bearman and G. T. Fowler, 306 Taft
Building, 1608 North Vine Street, Los Angeles 28,
California, HO-7271, Attorneys for Jennie Wuch-
ner, Petitioner on Review.

Martin Gendel, Suite 607 James Oviatt Building,
617 South Olive Street, Los Angeles 14, California,
Trinity 2346, Attorney for George T. Goggin,
Trustee.

Henry F. Poyet, 114 Pier Avenue, Hermosa
Beach, California, Redondo-8165, Attorney for Dora
Hill.

REFEREE'S CERTIFICATE ON PETITION
FOR REVIEW OF ORDER IN RE JENNIE
WUCHNER

To the Honorable Jacob Weinberger, Judge of the
Above-Entitled Court:

I, Benno M. Brink, one of the Referees in Bank-
ruptcy of the said Court, before whom the above-
entitled matter is pending, do hereby certify to the
following:

Within the time allowed by an appropriate order of your Referee, Jennie Wuchner, hereinafter called Wuchner, has filed her petition for the review of an order made by your Referee in the above-entitled matter on December 5, 1946, in which order your Referee determined the respective rights of the trustee in this matter and of the said Wuchner in and to certain real property which is here involved. [9]

The Proceedings

On or about June 5, 1945, the said Wuchner entered into an agreement for the sale of certain real property with the above-mentioned bankrupt. The purchase price of the said property was to be paid in certain installments. Thereafter, some of the said installments not having been paid, the said Wuchner commenced an action to quiet title in the Superior Court of the State of California in and for the County of Los Angeles against the said bankrupt and his wife, Dora Hill. Later, and while the said action was pending, an involuntary petition in bankruptcy was filed on April 5, 1946, against the said bankrupt. On May 1, 1946, an order of adjudication was entered on the said petition and, thereafter, George T. Goggin was duly appointed trustee in the matter.

On June 10, 1946, the trustee filed herein a petition for an order to show cause against Wuchner requiring her to appear and show cause why an order should not be entered decreeing the aforesaid agreement of sale to be in full force and effect.

An order to show cause was issued on the said petition and set for hearing on June 19, 1946. On June 18, 1946, Wuchner filed an answer to the said petition. On July 3, 1946, with leave of Court, an amended petition was filed in the premises by the trustee and an order to show cause issued thereon, returnable July 17, 1946. On July 18, 1946, Wuchner filed her answer to the said amended petition.

A number of hearings were had and Wuchner first objected to the jurisdiction of the Bankruptcy Court to hear and determine the issues raised by the trustee's aforesaid amended petition upon the ground that, at the time of the commencement of this bankruptcy proceeding, the aforesaid quiet title action was pending in the Superior Court of the State of California and that said State Court therefore had exclusive jurisdiction in the premises. When your Referee overruled the said objection to jurisdiction, Wuchner, without waiving such objection, proceeded on the merits of the case and contended [10] that, at the time of the commencement of this bankruptcy proceeding, the bankrupt had lost all of his rights under the aforesaid agreement of sale by defaults thereunder.

After full and complete consideration of all of the evidence and the law in the matter, your Referee, on November 18, 1946, filed herein a memorandum in which he held that the said agreement of sale was in full force and effect and that the trustee in this proceeding was entitled to a conveyance of the property here involved upon payment of the balance of the purchase price. On December 5, 1946, your

Referee signed and filed his formal findings of fact, conclusions of law and order in the matter and it is from this order that this review is taken.

The Questions Presented

The questions presented by this review are set forth on pages 6 to 11, inclusive, of the aforesaid petition for review, but your Referee believes that the said questions may be summarized as follows:

1. Does the Bankruptcy Court have jurisdiction in the matter here involved in the light of the pendency in the State Court of the aforesaid quiet title action at the time of the commencement of this bankruptcy proceeding?

2. Was your Referee correct in holding that the agreement of sale here involved is still in full force and effect and that the trustee in this matter is entitled to a conveyance of the property here in question upon payment of the balance of the purchase price?

The Evidence

The evidence in this matter is contained in the transcripts of the proceedings had before your Referee on June 19, July 24, August 14, and November 1, 1946, which are going up with this [11] certificate.

Findings of Fact, Conclusions of Law and Order of the Referee

A true copy of the findings of fact, conclusions of law and order of your Referee in this matter is going up with this certificate.

Papers Submitted

I hand up for the information of the Court the following papers:

1. Petition for Order to Show Cause re Jennie Wuchner, filed June 10, 1946.

2. Order to Show Cause re Jennie Wuchner, filed June 10, 1946.

3. Answer of Jennie Wuchner, filed June 18, 1946.

4. Amended Petition for Order to Show Cause re Jennie Wuchner, filed July 3, 1946.

5. Order to Show Cause re Jennie Wuchner, filed July 3, 1946.

6. Answer of Jennie Wuchner to Amended Petition of Charles E. Hill, filed July 18, 1946.

7. Points and Authorities of Jennie Wuchner, filed July 24, 1946.

8. Additional Points and Authorities (After Hearing), filed November 13, 1946.

9. Memorandum in re Trustee vs. Wuchner, filed November 18, 1946.

10. Respondent's Objections to the Trustee's Proposed Findings of Fact, Conclusions of Law and Order re: Jennie Wuchner, filed December 2, 1946.

11. A true copy of Findings of Fact, Conclusions of Law and Order re Jennie Wuchner, filed December 5, 1946.

12. Petition for Review of Referee's Order of December 5, 1946, filed January 10, 1947. [12]

13. Reporter's transcript of proceedings of June 19, 1946.

14. Reporter's transcript of proceedings of July 24th and August 14th, 1946.

15. Reporter's transcript of proceedings of November 1, 1946.

16. The following exhibits:

Trustee's

1. Agreement for sale of real estate.
2. Notice with return registered receipt to to Charles E. Hill, signed by Mrs. Jennie Wuchner.
3. Copy of letter dated June 28, 1946, to Mrs. Jennie Wuchner from Martin Gendel with check for \$5,035.43 with notice to Trustee George T. Goggin, Martin Gendel and Charles E. Hill and Dora Hill.
4. Letter dated 2-14-46 to Mr. H. F. Poyet, signed Mrs. Jennie Wuchner, with letter of 2-11-46 to Mrs. Jennie Wuchner from H. F. Poyet, and escrow instructions.
5. Letter dated 2-11-46 re escrow No. 32 to Angelus Escrow Service Company signed Frank Bruno and Teddy Berg.

Wuchner's

1. Notice to Charles E. Hill dated 2-8-46, signed Mrs. Jennie Wuchner with return receipt.

Respectfully submitted this 24th day of January, 1947.

/s/ BENNO M. BRINK,

Referee in Bankruptcy.

[Endorsed]: Filed Jan. 24, 1947. [13]

[Title of District Court and Cause.]

AMENDED PETITION FOR ORDER TO
SHOW CAUSE RE JENNIE WUCHNER

To the Honorable Benno M. Brink, Referee in
Bankruptcy:

Comes now your petitioner, George T. Goggin,
and respectfully represents:

I.

That he is the duly elected, qualified and acting
trustee in bankruptcy in the within bankruptcy pro-
ceeding.

II.

That prior to the commencement of the within
bankruptcy proceeding the bankrupt herein, Charles
E. Hill, entered into a written agreement with one
Jennie Wuchner for the purchase from her of cer-
tain real property and the improvements thereon
described as follows:

Lots 11, 12, 13, Block 173, of Redondo Beach,
in the City of Redondo Beach, County of Los
Angeles, State of California, as per map re-
corded in Book 39, page 1 of Miscellaneous
Records of said County; [14]

That the purchase price of said property was
\$5,500, and that on or about the 11th day of Feb-
ruary, 1946, the balance owing said Jennie Wuch-
ner under said contract was the sum of approxi-
mately \$4,912.63.

That said Charles E. Hill took possession of said real property under the terms of said sales contract upon the execution thereof, and on the 11th day of February, 1946, being then in possession of said real property, and the said contract for the purchase thereof being then in full force and effect and binding on both parties, the said Charles E. Hill did tender to the said Jennie Wuchner the full sum then owing on the purchase price of said real property, to-wit, the balance of \$4,912.63, and demanded of the said Jennie Wuchner a conveyance to him of said real property, in accordance with the terms of said sales contract; but the said Jennie Wuchner refused to accept said balance of said purchase price so tendered, or any part thereof, and refused to transfer title to said property to said Charles E. Hill, but instead wrongfully and without legal right, attempted to declare a forfeiture of said contract and the rights of the now bankrupt thereunder, and filed, under date of February 19, 1946, an action in the Superior Court of the State of California, in and for the County of Los Angeles, No. 510751, against the now bankrupt and his wife, entitled "Complaint to Quiet Title & Foreclosure of Purchasing Rights," whereby and wherein she apparently attempts to claim a forfeiture of said sales agreement and asserts that she is the owner of said property free and clear of any claims thereto by the bankrupt; that said action is now pending.

III.

That thereafter, on or about the 27th day of February, 1946, the bankrupt herein, Charles E. Hill, and his wife, Dora Hill, filed an action in the Superior Court of the State of California, in and for the County of Los Angeles, No. 511064, against Jennie Wuchner, et al, with reference to said sales agreement; that all the right, title and interest or claim of the said Dora Hill in and to said sales contract and real property covered thereby constitutes an asset of the within bankruptcy estate; that said complaint was entitled "Complaint for Declaratory Relief Under Section 1060 C. C. P." and is likewise predicated upon said sales contract above referred to; that said complaint asserts that the attempted forfeiture by Jennie Wuchner was unjustified and of no effect, and further alleges that the said Jennie Wuchner was motivated by bad faith and malice in attempting to declare a forfeiture against the bankrupt, and that the acts and conduct of the said Jennie Wuchner resulted in damage to the now bankrupt in the sum of \$20,000; that said action is now pending.

IV.

That your trustee, since the commencement of the within bankruptcy proceeding, has been in actual physical possession of the real property involved in said litigation, succeeding to the possession theretofore held by the bankrupt under said sales contract; that he is of the opinion, after examination of the facts and consultation with counsel, that the said Jen-

nie Wuchner is not entitled to clear title to said real property and that her attempted forfeiture was of no effect; that the issues determining title to said real property should be litigated before this Referee, particularly since the only steps taken in the State court have been filing of pleadings therein, and no actual trial has been had or other proceedings, in either of said Superior Court actions.

V.

That prior to the filing of the within amended petition your petitioner did legally tender to the said Jennie Wuchner all moneys which could possibly be claimed by her pursuant to the terms of said sales contract, being principal and interest due as [16] of February 5th, 1946, in accordance with the demand of the said Jennie Wuchner, in the sum of \$4,912.63, plus interest thereon at the rate of 6% per annum up to July 6th, 1946, in the sum of \$122.80, making a total tender of \$5,035.43; that prior to the filing of the within amended petition the said Jennie Wuchner did refuse and reject the said tender.

Wherefore your petitioner prays that this Court issue an order directing the said Jennie Wuchner and the said Dora Hill to appear and show cause, as follows:

1. Why the title to the real property described hereinabove should not be declared vested in the trustee, as an asset of the within bankruptcy estate,

free and clear of any claims by said Jennie Wuchner or said Dora Hill, upon the payment of the said sum of \$5,035.43;

2. Why said Jennie Wuchner and Dora Hill should not be restrained from proceeding with either of the above-entitled Superior Court actions, pending a determination by this Court of the issues now before it;

3. Why the determination of this Court should not be without prejudice to the rights of the trustee to sue in a proper court for such damages as this estate may be entitled to, if any, as a result of the acts and conduct of the said Jennie Wuchner;

4. Why this Court should not grant petitioner such other and further relief as may be proper.

Dated this 26th day of June, 1946.

/s/ GEORGE T. GOGGIN,
Trustee.

/s/ MARTIN GENDEL,
Attorney for Trustee. [17]

State of California,
County of Los Angeles—ss.

George T. Goggin, being by me first duly sworn, deposes and says: that he is the trustee in bankruptcy in the above-entitled action; that he has read the foregoing Amended Petition for Order to Show Cause Re Jennie Wuchner, and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ GEORGE T. GOGGIN.

Subscribed and sworn to before me this 26th day of June, 1946.

[Seal] /s/ ESTHER ANDERSON,
Notary Public in and for said County and State of
California.

[Endorsed]: Filed Jan. 24, 1947. Edmund L.
Smith, Clerk; By F. Betz, Deputy.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE
RE JENNIE WUCHNER

Upon reading and filing the amended verified petition of George T. Goggin, trustee in bankruptcy in the above-entitled matter, and good cause appearing therefrom, on motion of Martin Gendel, attorney for said trustee,

It Is Hereby Ordered that Jennie Wuchner and Dora Hill be and appear before the undersigned Referee, in his courtroom located on the 3rd floor of the Federal Building, Los Angeles, California, on the 17th day of July, 1946, at the hour 10 o'clock a.m., then and there to show cause why the prayer of said amended petition should not be granted.

It Is Further Ordered that service of this Order to Show Cause may be made upon the respondents above named as follows: on respondent Jennie Wuchner by mailing a copy thereof, with a copy of the amended petition upon which the same is based, to Messrs. William W. Bearman and G. T. Fowler, attorneys for said Jennie Wuchner, at their office address, to-wit, 1680 North Vine Street, Los Angeles 28, California; and on the respondent Dora Hill by [19] mailing a copy thereof, with a copy of the amended petition upon which the same is based, to Henry F. Poyet, Esq., attorney for said Dora Hill, at his office address, to-wit, 114 Pier Avenue, Hermosa Beach, California.

Dated this 3rd day of July, 1946.

/s/ BENNO M. BRINK,

Referee in Bankruptcy.

[Endorsed]: Filed Jan. 24, 1947. [20]

[Title of District Court and Cause.]

ANSWER OF JENNIE WUCHNER TO
AMENDED PETITION OF CHARLES E.
HILL

Comes Now, Jennie Wuchner, and respectfully represents as follows:

I.

Admits that George T. Goggin is the duly elected, qualified and acting Trustee in Bankruptcy in the within bankruptcy proceedings.

II.

Admits that prior to the commencement of the within bankruptcy proceeding the bankrupt herein, Charles E. Hill, entered into a written agreement with one Jennie Wuchner for the purchase from her of certain real property and the improvements thereon. Admits that the purchase price of said property was \$5500.00, but alleges that on the 8th day of February, 1946, the said Charles E. Hill, doing business as Hill Machine Tools, and Dora Hill, had no interest in the real property covered by said contract, or any rights under said contract, by reason of the fact that same had been cancelled [21] and terminated, save and except such moneys as were coming to the said Jennie Wuchner for taxes under said contract. Said Jennie Wuchner denies that the said contract was in full force and effect on the 11th day of February, 1946, and that the said Charles E. Hill tendered to the said Jennie Wuchner the amount of \$4,912.63, and denies that Jennie Wuchner refused to accept such amount, or

any part thereof, and denies that she refused to transfer title to said real property to said Charles E. Hill. Denies that she, without any legal right, attempted to declare a forfeiture of said contract and the rights of the bankrupt thereunder, but admits that she filed regularly under date of February 19, 1946, an action in the Superior Court of the State of California, in and for the County of Los Angeles, No. 511,075, against the now bankrupt and his wife, and that said action is now pending. And further, the said Jennie Wuchner sets out that in the above-entitled action a *Lis Pendens* was filed at the time said action was filed, covering the real property described in the petition and also in the action above referred to.

III.

Admits that on or about the 27th day of February, 1946, Charles E. Hill, the bankrupt herein, and his wife, Dora Hill, filed an action in the Superior Court of the State of California, in and for the County of Los Angeles, No. 511,064, against Jennie Wuchner, being an action for declaratory relief, in which action the defendant Jennie Wuchner has filed her verified answer to said complaint, and the said action is now pending.

IV.

Answering Paragraph IV of said petition, denies generally and specifically each and every allegation therein contained, and each and every part thereof.

For a Further, Separate and Distinct Affirmative Defense, the said Jennie Wuchner alleges: [22]

I.

That the Superior Court of the State of California, in and for the County of Los Angeles, having acquired jurisdiction of the subject matter and of the parties involved in the within proceeding by reason of the actions filed, which were filed prior to the time of the adjudication of bankruptcy of the said Charles E. Hill, said jurisdiction remains with the State Court for the trial of said matter and the final determination thereof; that the Bankruptcy Court has no jurisdiction of the within proceedings.

II.

Further answering said petition, the said Jennie Wuchner denies the right of the Referee in Bankruptcy to try and adjudicate in anywise title to the said real property and/or the subject matter covered therein, and/or the issues involved in actions of this character, by reason of the fact that the Referee in Bankruptcy is precluded from trying actions of this kind.

Wherefore, the said Jennie Wuchner prays that this Court do not issue an Order to Show Cause against her to determine in said Court by said Referee title to said real property and/or that title should be declared vested in the Trustee, and/or that said real property, and/or any rights therein, are assets of the bankrupt estate herein free and clear of any claim by said Jennie Wuchner; and that the petition of the said George T. Goggin, as Trustee in Bankruptcy be dismissed.

/s/ WILLIAM W. BEARMAN,

Attorney for Jennie Wuchner.

State of California,
County of Los Angeles—ss.

Jennie Wuchner, being by me first duly sworn, deposes and says: that she is the Respondent in the above-entitled action; that she has read the foregoing Answer and knows the contents thereof; and that the same is true of her own knowledge, except as to the matters which are therein stated upon her information or belief, and as to those matters that she believes it to be true.

/s/ JENNIE WUCHNER.

Subscribed and sworn to before me this 16th day of July, 1946.

[Seal] /s/ MEYER C. SOLOMON
Notary Public in and for Said County and State of California.

My Commission Expires Nov. 8, 1948.

[Affidavit of service by mail attached.]

[Endorsed]: Filed Jan. 24, 1947. [24]

[Title of District Court and Cause.]

MEMORANDUM IN RE TRUSTEE VS.
WUCHNER

On February 5, 1946, the respondent Wuchner exercised the right she had under the contract here involved and declared the whole amount of principal and interest under the contract immediately due and payable. By doing so, the said respondent waived the right under the contract, if any she then

had, to terminate the contract by reason of defaults then existing, if any existed, in the payment of installments under the contract.

Consequently, the notice of forfeiture and cancellation given by the said respondent on February 8, 1946, was wholly ineffective.

Under the contract, any default of the bankrupt in failing to pay the whole amount of the contract, as demanded by the said respondent, could not become effective for thirty days from the date of such demand. Within said thirty-day period, an offer of performance was made on behalf of the bankrupt. Any defect or irregularity in such offer, if any there were, was waived by the failure of the respondent to object thereto. It is clear, from the record in the [25] case, that at the time the said offer of performance was made, the bankrupt was able and willing to perform according to the offer. (*Backus v. Sessions* (1941) 17 Cal. (2d) 380.)

The conclusion is inescapable that the aforesaid offer of performance was in all respects good and sufficient. However, even if it were wholly ineffective, the fact remains that within the aforesaid thirty-day period after demand was made by the respondent for the payment of the whole of the principal and interest under the contract, the respondent unequivocally stated that the contract was forfeited and cancelled. This was a clear indication on her part that no offer of performance by or on behalf of the bankrupt would be considered by her and, consequently, no further offer of performance by the bankrupt was required or necessary.

The Referee concludes that the contract here in question is in full force and effect and that the trustee in bankruptcy, upon payment of the balance of the purchase price, is entitled to a conveyance of the property here involved, together with the policy of title insurance referred to in the contract.

Counsel for the trustee will prepare appropriate findings, conclusions and order and deposit the original and one copy thereof with the Referee and serve a copy thereof on counsel for the respondent, who may have the time prescribed by Rule 7 of this Court to submit his objections, if any he has thereto.

Dated: November 18, 1946.

BENNO M. BRINK,
Referee in Bankruptcy.

[Endorsed]: Filed Jan. 24, 1947. [26]

[Title of District Court and Cause.]

RESPONDENT'S OBJECTIONS TO THE
TRUSTEE'S PROPOSED FINDINGS OF
FACT, CONCLUSIONS OF LAW AND
ORDER RE: JENNIE WUCHNER

Comes Now the respondent, Jennie Wuchner, and respectfully submits her objections to the Trustee's proposed findings of fact, conclusions of law, and order re: Jennie Wuchner, as follows:

I.

The respondent respectfully submits that if the matters covered in the Trustee's Recital beginning

at line 17 on page 1, and ending at line 17, page 2 thereof, covers the findings as shown by the official records in this case, the same may stand without change, with this added finding: That at all times during this proceeding, as well as on the 14th day of August, 1944, respondent objects to the jurisdiction of the court upon the theory that pursuant to the cases laid down, a matter of this kind cannot be tried by a Referee in Bankruptcy upon an order to show cause and in a summary proceeding. [27]

II.

Referring to paragraph I of Trustee's Proposed Findings of Fact, beginning with line 22 and ending with line 29 on page 2 thereof, respondent has no objections to the matters set forth therein.

III.

Referring to paragraph II of Trustee's Proposed Findings beginning with line 18 on page three thereof the trustee sets out as follows: "* * * that no notice of default, nor any evidence of demand for payment were proven at the time of the hearing of this matter prior to the demand set forth * * *." Mrs. Hill testified that demands for payments were made upon her by Norman Wuchner for Jennie Wuchner but that her situation had changed and neither she nor Mr. Hill could keep up the payments or carry out the terms of the contract. The contract provides at line 30, page 3, that should default be made in payment of any installment when due, the

whole sum of principal and interest should become immediately due at the option of the seller. At line 10 it is agreed that time is the essence of this contract and in the event of failure to comply with the terms thereof by said buyer then the seller should be relieved from all obligations of law and equity to convey said property to the buyer and the buyer shall forfeit all rights thereto and to all money theretofore paid under this contract. Certain monthly defaults became effective thirty days from the date of said defaults and no notice, written or oral was required to be made by the respondent upon the buyer and when written demand was made for the total amount of the contract price and a termination of the contract by a latter notice, neither of these notices waived or excused buyer from the defaults for the monthly payments of October, November, and December, of 1945, and January, 1946, and by the very terms of the contract these defaults became absolute and gave respondent a right to cancel the contract. [28]

IV.

Referring to paragraph III of Trustee's Findings respondent does not understand the language and finds the same ambiguous and sets out with reference to the written notice of the 8th of February, 1946, that under the terms of the contract she was within her rights in taking such a position, and asks that it be stricken.

V.

Referring to paragraph IV of Trustee's proposed findings the respondent respectfully sets out that prior to a thirty-day period and less than thirty days from the exercising of said option by Jennie Wuchner, that the contract was cancelled and the said Charles A. Hill, through his attorney and agent in fact, to wit: Henry Poyet, Attorney at law and president of the Angeles Escrow office, submitted, in writing, a purported offer of payment of \$4,912.63; but it must be borne in mind that this being an action in equity, find the sworn testimony of Mr. Poyet of this matter disclosed that according to Mr. Poyet's own testimony, the escrow instructions that were introduced by the Trustee that there was \$4,912.63 for Jennie Wuchner there, was not true; that there was no money on deposit for her in this escrow and this coupled with the testimony of Mrs. Hill herself that their situation "had changed on account of the trouble her husband was in", that she was not able to carry out this contract. The evidence disclosed and the Findings should show that at the time of the alleged offer to perform the buyers were not ready, nor able, nor willing to perform the terms of the contract, but, on the contrary showed by their own testimony that there was no money on deposit for the sellers, anywhere, and showed an absolute inability on the part of the buyers to carry out the terms and conditions of the contract. Referring to the second paragraph under paragraph IV of Trustees proposed Findings, Jennie Wuchner

admits that after [29] cancelation of the contract by her, which she had a right to do, she did not accept a pretended offer, and it is disclosed that at the time this so-called offer was made, Jennie Wuchner was acting within her rights under the contract. Strike.

VI.

Referring to paragraph VI of Trustee's proposed Findings, respondent sets out that there should be eliminated therefrom that part of the paragraph beginning on line 6 with the word "apparently" and ending with the word "buyer" in line 7. Strike.

VII.

Referring to paragraph VII there was no evidence as to what the Trustee had discovered insofar as any equity in the bankrupt's estate is concerned although it is true that the Trustee sent a check of \$5,035.43 to the Respondent's attorney, which was refused, but this offer came months after the contract was terminated and the buyer was then in default and the defaults had become absolute and buyer had not complied with the terms of the contract. Strike paragraph VII as not warranted by the evidence. * * *

I.

Referring to paragraph I of Trustee's proposed Conclusions of Law, that is not a correct conclusion. The seller complied with the terms of the contract in giving the notice that she did and in

exercising the option that she did, and certain payments had become delinquent and in default under the terms of the contract and the rider attached to the contract. No other interpretation or conclusion would be right. To write into the contract a provision that does not exist there would be remaking a contract. By exercising her option Jennie Wuchner did not waive her right under the agreement of sale to terminate the agreement by reason of any defaults that might have existed arising from any non-payment of installments in the agreement of sale. To make such [30] a conclusion one would have to nullify the terms of the contract itself and make provisions in the contract that are not there. Strike all of this paragraph as not warranted by the evidence.

II.

Calling the Court's attention to paragraph IV, to be fair, the true evidence should be disclosed that although there was an admitted offer by the attorney, to-wit: Henry Poyet, it was not in accordance with the terms and conditions of said agreement of sale and the evidence disclosed that it could not meet the demand of the sellers. Unequivocally, the testimony showed that the buyer did not have the money and that there was no money of any kind available in the escrow, or elsewhere, and that the buyers did not have the ability, nor were they able or willing to comply with the terms of the contract but, on the contrary, the evidence strongly showed a contrary situation. Strike all of the allegations contained in this paragraph as not warranted by the evidence.

III.

Referring to paragraph V of Trustee's proposed Conclusions of Law, Jennie Wuchner admits that she sent certain notices, and made certain allegations, but same were all within the terms prescribed under the contract and there was nothing that she did wrongfully; that when she terminated the contract and exercised these rights, that she did same lawfully and pursuant to the contract and that the buyers failed to comply with the terms thereof. Strike all of this paragraph as not in conformity with the proof of facts, documentary or oral, and the law pertaining to the same. Strike paragraph VII of Conclusions as not warranted by evidence.

IV.

Referring to paragraph VI of Trustees proposed Conclusions of Law, strike all of said paragraph as not in conformity with the proof of facts, documentary or oral, and the law pertaining to the same. [31]

1.

Referring to paragraph II of Trustees Proposed Order, respondent asks that the entire paragraph, beginning with the words on line 8 "That George T. Goggin * * *" and ending on line 24 "* * * sale contained in Trustees's Exhibit No. 1.", be stricken on the ground that this is a legal conclusion not borne out by the evidence and there is no provision in the contract itself authorizing such an order, nor

is the trustee entitled to such an order by reason of any proof and/or evidence, documentary or otherwise, produced at the trial.

Respectfully submitted,

WILLIAM W. BEARMAN and
G. T. FOWLER

By /s/ WILLIAM W. BEARMAN,
Attorneys for Respondent.

[Affidavit of service by mail attached.]

[Endorsed]: Filed Jan. 24, 1947. [33]

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER RE JENNIE WUCH-
NER

Pursuant to an original, verified petition of George T. Goggin, trustee in bankruptcy in the above entitled matter, an order to show cause was duly issued thereon as against the respondents Jennie Wuchner and Dora Hill, wife of the bankrupt herein, concerning the rights of the trustee in the within proceedings to the ownership of certain real property, and the respondent Jennie Wuchner having filed an answer thereto, the order to show cause was duly heard before this court on the 19th day of June, 1946, at which time the respondent

Jennie Wuchner was represented by her counsel William W. Bearman and G. T. Fowler, the respondent Dora Hill was present and represented by her counsel Henry F. Poyet, and the trustee was represented by his counsel Martin Gendel, and the matter having been partially heard, an order was made permitting the trustee to file an amended petition for order to show cause, an amended order to show cause, prior to July 5, 1946, and, pursuant to the order of court, George T. Goggin, as trustee, filed a verified amended petition for an order to show cause and this court did then issue an order to show cause thereon directed to the respondents Jennie Wuchner and Dora Hill; [34] that said order predicated on the amended petition of the trustee was duly served upon the respondent Jennie Wuchner and the respondent Dora Hill, and, pursuant thereto, a hearing thereon was set for the 17th day of July, 1946, the respondents being represented by the counsel aforesaid. Said hearing was thereafter continued to the 24th day of July, 1946, at which time the respondent Jennie Wuchner filed an answer to the amended petition and made an objection to the jurisdiction of the Referee to hear the issues involved in the order to show cause. The matter was then duly continued to the 14th day of August, 1946, at which time the objections of Jennie Wuchner to the jurisdiction of the said court were overruled and the matter was thereupon continued to the 18th day of October, 1946, and, thereafter continued to the 1st day of November, 1946, at which time certain stipulations of fact were entered into

by and between the counsel aforementioned and oral and documentary evidence having been argued and submitted, and the respondent Jennie Wuchner having filed additional points and authorities, and the matter having been duly considered, and the undersigned Referee having made and filed a Memorandum dated November 18, 1946,

Now, Therefore:

FINDINGS OF FACT

The undersigned Referee hereby makes the following Findings of Fact:

I.

That George T. Goggin is the duly elected, qualified and acting trustee in the within bankruptcy proceedings; that Dora Hill is the wife of Charles E. Hill, the bankrupt in the within proceedings; that as against the said George T. Goggin, acting as trustee, the said Dora Hill, as wife of the bankrupt, has no right, title or interest in and to the real property and the issues involved in the within Order to Show Cause, and, further, that said George T. Goggin, as trustee, has succeeded to all of the rights of Charles E. Hill in and to the agreement for sale of real estate hereinafter referred to.

II.

That on or about the 5th day of June, 1945, the respondent Jennie Wuchner, as seller, and the bankrupt, Charles E. Hill, as buyer, entered into [35]

an agreement for the sale of real estate, wherein the buyer agreed to purchase all of that certain real property described as follows, to-wit:

Lots 11, 12, 13, Block 173, of Redondo Beach, in the city of Redondo Beach, county of Los Angeles, state of California, as per map recorded in Book 39, Page 1 of Miscellaneous Records of said County;

that said agreement has been introduced in evidence as the trustee's Exhibit No. 1; that pursuant to said agreement the bankrupt herein did take physical possession of said real property and did remain in physical possession thereof until George T. Goggin, as trustee, took over said physical possession on behalf of the within estate; that said agreement by the terms thereof provided for the making of certain payments, and it appears that \$349.38 was paid at the time of the execution of said agreement, and that thereafter only one or two of the installment payments provided for in said agreement were paid, and that the installment payments due and owing for the months of October, November and December, 1945, and January, 1946, were not made by the bankrupt herein in accordance with the provisions of the agreement; that no notices of default, nor any evidence of demand for payment were proven at the time of the hearing of this matter prior to the demand set forth in words and figures as contained in the trustee's Exhibit No. 2, being a written notice signed by respondent Jennie Wuchner and

dated February 5, 1946; that the said notice was served on the bankrupt herein, and upon the respondent Dora Hill, on or about February 6, 1946, and, after referring to the agreement for the sale of real estate, and the description thereof, and the fact that certain installment payments were then in default, contains the following language:

“ * * * the seller hereby exercises the Option contained therein and declares the whole amount of principal and interest now due and unpaid under said Agreement, namely, the sum of \$4,912.63 due, and hereby demands that you pay forthwith to the seller the said sum of \$4,912.63, being the principal and interest now due unpaid”; [36]

that the agreement of sale, dated June 5, 1945, being trustee's Exhibit No. 1, contains the express provision therein as follows:

“It is further agreed that any default shall not become effective for Thirty days (30) from date of said default.”

III.

That by written notice dated February 8, 1946, and contained in respondent Jennie Wuchner's Exhibit No. 1, the said Jennie Wuchner ignored the exercise of her option as aforementioned, and did not notify the bankrupt herein that, because of the default in the installment payments as provided for in the agreement, the said Jennie Wuchner declared the agreement forfeited and cancelled.

IV.

That within a reasonable time after the receipt of the option to declare the entire amount then due and owing, as set forth in 'Trustee's Exhibit No. 2, the bankrupt, Charles E. Hill, through his attorney and agent-in-fact, to-wit, Henry Poyet, and his wife, Dora Hill, and less than thirty days from the exercise of said option by Jennie Wuchner, did tender, in writing, as shown and set forth in 'Trustee's Exhibit No. 4, the sum of \$4,912.63; that pursuant to the terms of the agreement of sale, being Trustee's Exhibit No. 1, the receipt of these monies was contingent upon the seller providing the buyer with a Certificate of Title Policy, showing the property free and clear, and, in accordance with the terms of the agreement the said sum of \$4,912.63 was duly offered to Jennie Wuchner as the seller at a time when the offer could be performed in accordance with the terms and conditions thereof.

V.

That prior to the expiration of thirty days from the original exercising of the option by Jennie Wuchner to declare the entire amount due and payable, and pursuant to her attempted election to declare the agreement terminated and cancelled, as per Jennie Wuchner's Exhibit No. 1, the said Jennie Wuchner did again arbitrarily and unequivocally refuse to accept any offer of payment, and did so refuse without specifying any defect or irregularity in the offer to pay in full, as described hereinabove. [37]

VI.

That thereafter, and on or about the 19th day of February, 1946, the said Jennie Wuchner filed an action (numbered 510751) in the Superior Court of the State of California, in and for the County of Los Angeles, against the now bankrupt and his wife, Dora Hill, entitled "Complaint to Quiet Title & Foreclosure of Purchasing Rights", apparently attempting by said proceedings to retain the monies theretofore paid to her by the buyer, and to declare the agreement cancelled and free of any claims of the buyer; that by stipulation between counsel for said plaintiff and the defendants, no answer or other proceedings were filed or had in the said Superior Court action prior to the commencement of the within bankruptcy proceedings on or about the 5th day of April, 1946; that on or about the 27th day of February, 1946, an action was filed by the bankrupt and his wife in the Superior Court of the State of California, in and for the County of Los Angeles, and numbered 511064, against the respondent Jennie Wuchner, seeking declaratory relief to the extent that the agreement should not be declared forfeited, and also seeking damages against the respondent Jennie Wuchner; that in this superior court action, after a demurrer and other hearings on the pleadings, the defendant Jennie Wuchner filed an answer, and no further or other steps were taken in said superior court action prior to the commencement of the within bankruptcy proceedings.

VII.

That upon being elected as trustee in the within bankruptcy proceedings, and pursuant to the possession which he had taken of the real property involved, as receiver, the said George T. Goggin, in order to maintain the offer and tender theretofore made by Charles E. Hill, and in accordance with the document set forth in said Trustee's Exhibit No. 3, the said trustee did offer to pay the sum of \$5,035.43, which was stipulated to be all of the monies owing pursuant to the terms of the agreement as of July 6, 1946; the date of the offer and tender of payment by the trustee; that without objecting to the offer of payment and tender thereof in any manner as to any defect or irregularity [38] the said respondent Jennie Wuchner refused to accept the same and returned the monies to the trustee herein, and the said monies, evidenced by a check, have been deposited with this court along with the rejection thereof, as contained in Trustee's Exhibit No. 3.

VIII.

That it now appears that respondent Jennie Wuchner holds the legal title to the real property described above, free and clear of all incumbrances save and except covenants, conditions, restrictions, reservations, rights, rights of way, and/or easements of record, and the agreement for the sale of said property hereinbefore mentioned.

CONCLUSIONS OF LAW

From the above Findings of Fact, the undersigned Referee does make the following Conclusions of Law :

I.

That by not legally insisting upon the making of the regular monthly installment payments as provided for in the agreement of sale, contained in Trustee's Exhibit No. 1, the seller waived the provisions as to time being of the essence contained in said agreement, at least as to those payments existing prior to the notice of election of option dated February 5, 1946.

II.

That the agreement of sale contained in Trustee's Exhibit No. 1 gave to the seller an option to declare the entire balance of principal and interest then due and owing, providing the buyer did not make the installment payments as provided in said agreement; that on or about the 5th day of February, 1946, the seller effectively elected and exercised the said option and made a demand for \$4,912.63 as the amount then due and owing; that pursuant to the express provisions of said agreement the buyer had thirty (30) days from the date of the receipt of said notice on February 6, 1946, within which to comply with said demand of seller.

III.

That by so exercising her option, the said Jennie Wuchner, as seller, waived any right she might then have under the agreement of sale to [39] terminate the agreement by reason of any defaults that might then have existed arising from any non-payment of installments under the agreement of sale.

IV.

That pursuant to the demand of seller, and in accordance with the terms and conditions of said agreement of sale, the buyer made a proper offer, through his attorney and agents, with which offer he could then comply, tendering the sum of \$4,912.63, and thereby effectively meeting the demand of the seller as contained in the notice of February 5th; that contrary to the express terms of the agreement of sale and the demand of February 5th, the buyer wrongfully failed and refused to accept said offer, and the buyer is now entitled to the Grant Deed to the real property involved, and the Certificate of Title insuring the same, pursuant to the terms of said agreement of sale.

V.

That on or about February 8, 1946, the respondent, Jennie Wuchner, having prior thereto elected to exercise her option to declare the entire balance of principal and interest on the agreement to be due and owing, and before the thirty days had expired within which the buyer could comply with said

exercise of option and demand pursuant thereto, did wrongfully notify the buyer that the seller had terminated and cancelled the aforesaid agreement of sale, and did repeat this wrongful termination and cancellation by her return of the documents as contained in Trustee's Exhibit No. 4, being her letter of February 14, 1946, to the attorney for Charles E. Hill, that the aforesaid unequivocal indications by the seller that no offer of performance by or on behalf of the buyer would be considered by her, rendered it unnecessary for the buyer to thereafter make any further offer of performance.

VI.

That the trustee in bankruptcy having renewed the offer to pay the balance of principal and interest owing on the aforesaid agreement of sale, and having tendered the monies owing as of July 6, 1946, the maximum amount which could be payable to the said seller is determined to be the sum of the trustee's tender, to wit, \$5,035.43. [40]

ORDER

From the above Findings of Fact and Conclusions of Law, the undersigned Referee does hereby make the following order:

I.

That Dora Hill has no right, title or interest in and to the real property described herein, as against George T. Goggin as trustee in bankruptcy.

II.

That George T. Goggin, as trustee in the within bankruptcy proceeding, is the owner of the real property described as follows:

Lots 11, 12, 13, Block 173, of Redondo Beach, in the city of Redondo Beach, county of Los Angeles, State of California, as per map recorded in Book 39, Page 1 of Miscellaneous Records of said County,

free and clear of any claims of the respondent Jennie Wuchner; that upon payment of the sum of \$5,035.43 by the said trustee in bankruptcy to the respondent Jennie Wuchner, the said Jennie Wuchner is to immediately and concurrently therewith execute a Grant Deed to George T. Goggin as trustee in bankruptcy of the estate of Charles E. Hill, conveying the aforesaid real property free and clear of all incumbrances save and except covenants, conditions, restrictions, reservations, rights, rights of way, and/or easements of record, taxes to be prorated as of the 6th day of July, 1946, and, further, said Jennie Wuchner is ordered to furnish a policy of title insurance as specified in the agreement of sale contained in Trustee's Exhibit No. 1.

Dated: December 5, 1946.

BENNO M. BRINK,
Referee in Bankruptcy.

[Endorsed]: Filed Jan. 24, 1947. [41]

[Title of District Court and Cause.]

PETITION FOR REVIEW OF REFEREE'S
ORDER BY JUDGE

To the Honorable Benno M. Brink, Referee in
Bankruptcy and to the District Court of the
United States for the Southern District of Cali-
fornia, Central Division:

The petition of Jennie Wuchner respectfully rep-
resents:

1. Your petitioner is the Respondent who was
named in an original Order to Show Cause that
was heard before this Court on the 19th day of
June, 1946.

2. Your petitioner, Jennie Wuchner, having filed
an Answer to said Order to Show Cause, and same
was heard before the Referee in Bankruptcy on the
19th day of June, 1946, at which time the Respond-
ent Jennie Wuchner was represented by her counsel
William W. Bearman and G. T. Fowler, the re-
spondent Dora Hill was present and represented
by her counsel Henry F. Foyet, and the trustee was
represented by his counsel Martin Gendel, and the
matter having been [42] partially heard, an order
was made permitting the trustee to file an amended
petition for order to show cause, and an amended
order to show cause, prior to July 5, 1946, and,
pursuant to the order of the Court, George T. Gog-
gin, as Trustee, filed a verified amended petition
for an order to show cause, and this Court did
then issue an order to show cause thereon directed
to the Respondents Jennie Wuchner and Dora Hill;

that said order predicated on the amended petition of the trustee was duly served upon the Respondent Jennie Wuchner and the Respondent Dora Hill, and, pursuant thereto, a hearing thereon was set for the 17th day of July, 1946, the Respondents being represented by the counsel aforesaid. Said hearing was thereafter continued to the 24th day of July, 1946, at which time the Respondent Jennie Wuchner filed an answer to the amended petition and made an objection to the jurisdiction of the Referee to hear the issues involved in the order to show cause. The matter was then duly continued to the 14th day of August, 1946, at which time the Court overruled the objections of Jennie Wuchner, made from the outset of these proceedings to the jurisdiction of the said Court, and the matter was thereupon continued to the 18th day of October, 1946, and, thereafter continued to the 1st day of November, 1946.

The petitioner in said amended petition, George T. Goggin, as Trustee in Bankruptcy of the above estate, was permitted to, and did file his amended petition, as against Jennie Wuchner. This original petition and the amended petition prayed that title to certain real property that said Charles E. Hill had agreed to purchase as the Buyer and said Jennie Wuchner had agreed to sell as the Seller, which certain real property was located in the City of Redondo Beach, County of Los Angeles, State of California, described as follows:

Lots 11, 12 and 13, in Block 173, of Redondo Beach, in the City of Redondo Beach, County

of Los Angeles, State of California, as per map recorded in Book 39, Page 1, Miscellaneous Records of said County.

Subject To: Covenants, conditions, restrictions, reservations, rights, rights of way, and/or assessments, if any, of record.

should vest in the Trustee in Bankruptcy.

3. The said Jennie Wuchner had filed an answer to these proceedings, setting forth:

(a) That the Referee in Bankruptcy had no jurisdiction to try a matter involving title to real property in a summary proceeding. Your respondent respectfully called to the Court's attention the Points and Authorities of Jennie Wuchner filed in said case, as appears by the written Memorandum on file herein, citing amongst other cases

In re Black Bear Products Co.,
56 Fed. 2nd 243;

In re Seebold,
105 Fed. 910;

In re Greene-Halliday Co.,
(CC 2) 57 Fed. 175.

and see all of the other cases, and summary, as cited under the Points and Authorities filed with the Court by Jennie Wuchner on this matter, and the additional Points and Authorities, as appears in the Memorandum, and Authorities filed by Jennie Wuchner, entitled: Additional Points and Authorities After Hearing, and Petitioner respectfully requests that same shall be considered by this Honorable Court on this Petition for Review of Referee's Order.

4. That on the 18th day of November, 1946, the Honorable Benno M. Brink, Referee in Bankruptcy, filed his Memorandum designated In Re Trustee vs. Wuchner, as follows:

“In the Matter Charles E. Hill, dba Hill Machine Tools, Bankrupt. In Bankruptcy No. 44,347-W. Memorandum In Re Trustee vs. Wuchner. [44]

“On February 5, 1946, the respondent Wuchner exercised the right she had under the contract here involved and declared the whole amount of principal and interest under the contract immediately due and payable. By doing so, the said respondent waived the right under the contract, if any she then had, to terminate the contract by reason of defaults then existing, if any existed, in the payment of installments under the contract.

“Consequently, the notice of forfeiture and cancellation given by the said respondent on February 8, 1946, was wholly ineffective.

“Under the contract, any default of the bankrupt in failing to pay the whole amount of the contract, as demanded by the said respondent, could not become effective for thirty days from the date of such demand. Within said thirty-day period, an offer of performance was made on behalf of the bankrupt. Any defect or irregularity in such offer, if any there were, was waived by the failure of the respondent to object thereto. It is clear from the record in the case, that at the time the said offer of performance was made, the bankrupt was able and willing to perform according to the offer, (*Backus v. Sessions* (1941) Cal. (2d) 380).

“The conclusion is inescapable that the aforesaid offer of performance was in all respects good and sufficient. However, even if it were wholly ineffective, the fact remains that within the aforesaid thirty-day period after demand was made by the respondent for the payment of the whole of the principal and interest under the contract, the respondent unequivocally stated that the contract was forfeited and cancelled. This was a clear indication on her part that no offer of performance by or on behalf of the bankrupt would be considered by her and, consequently, no further offer of performance by the bankrupt was required or necessary.

“The Referee concludes that the contract here in question is [45] in full force and effect and that the trustee in bankruptcy, upon payment of the balance of the purchase price, is entitled to a conveyance of the property here involved, together with the policy of title insurance referred to in the contract.

“Counsel for the trustee will prepare appropriate findings, conclusions and order and deposit the original and one copy thereof with the Referee and serve a copy thereof on counsel for the respondent who may have the time prescribed by Rule 7 of this Court to submit his objections, if any he has thereto

“Dated: November 18, 1946.

“BENNO M. BRINK,

“Referee in Bankruptcy.”

And, later, after the submission of findings of fact, conclusions of law, and order in re Jennie Wuchner, submitted by the Trustee, the Referee eliminated from the findings of fact and conclusions of law, as follows:

“On Page 5, lines 24 to 26, I struck out the following words: ‘did ascertain that there was a substantial equity in and to the said real property above the balance then owing to the respondent Jennie Wuchner, and’,”

And added thereto, as follows:

“On Page 6, line 9, I added the following: ‘and the agreement for the sale of said property hereinbefore mentioned.’ ”

5. That the Referee in Bankruptcy, on the 5th day of December, 1946, made the following Order, reading as follows:

“ORDER

“From the above Findings of Fact and Conclusions of Law, the undersigned Referee does hereby make the following order:

“I.

“That Dora Hill has no right, title or interest in and to the real property described herein, as against George T. Goggin as trustee in bankruptcy.

“II.

“That George T. Goggin, as trustee in the within bankruptcy proceeding, is the owner of the real property described as follows:

“Lots 11, 12, 13, Block 173, of Redondo Beach in the city of Redondo Beach, County of Los Angeles, State of California, as per map recorded in Book 39, Page 1 of Miscellaneous Records of said County,

free and clear of any claims of the respondent Jennie Wuchner; that upon payment of the sum of \$5,035.43 by the said trustee in bankruptcy to the respondent Jennie Wuchner, the said Jennie Wuchner is to immediately and concurrently therewith execute a Grant Deed to George T. Goggin as trustee in bankruptcy of the estate of Charles E. Hill, conveying the aforesaid real property free and clear of all incumbrances save and except covenants, conditions, restrictions, reservations, rights, rights of way, and/or easements of record, taxes to be prorated as of the 6th day of July, 1946, and, further, said Jennie Wuchner is ordered to furnish a policy of title insurance as specified in the agreement of sale contained in Trustee's Exhibit No. 1.

“Dated, December 5th, 1945.

“BENNO M. BRINK,

“Referee in Bankruptcy.”

That said Memorandum in Re Trustee vs. Wuchner, and the Order hereinabove referred to, and the findings made by the Referee herein in the above matter, are contrary to the evidence, not supported by the evidence, and the findings and conclusions of law are illegal, unconstitutional, and improper, and not in accord with the facts and the law in this case.

The Respondent particularly sets out that the Referee erred:

1. In setting out that "On February 5, 1946, the respondent [47] Wuchner exercised the right she had under the contract here involved and declared the whole amount of principal and interest under the contract immediately due and payable. By doing so, the said respondent waived the right under the contract, if any she then had, to terminate the contract by reason of defaults then existing, if any existed, in the payment of installments under the contract."

2. In also setting out that by reason of same that "George T. Goggin, as trustee in the within bankruptcy proceeding, is the owner of the real property described as follows:

"Lots 11, 12, 13, Block 173, of Redondo Beach, in the City of Redondo Beach, County of Los Angeles, State of California, as per map recorded in Book 39, Page 1 of Miscellaneous Records of said County,

free and clear of any claims of the respondent Jennie Wuchner."

3. In the finding that "The notice of forfeiture and cancellation given by the said Respondent on February 8, 1946, was wholly ineffective.

4. In the finding and the order made thereunder that "Under the contract any default of the bankrupt in failing to pay the whole amount of the contract, as demanded by the said respondent, could

not become effective for thirty days from the date of such demand." This would read into the contract a provision that is not in same.

5. Further respondent cites as erroneous, and not in keeping with the facts in this case, as the transcript will show, that a proper offer of performance was made on behalf of the bankrupt and that any defect, or irregularity in such offer, if any there were, was waived by the failure of the respondent to object thereto. There was never any proper tender made at any time prior to the time that said contract was cancelled by the Seller, as she had a right to, for failure to comply thereto, and it is certainly not in keeping with what the testimony was that the record in the case, as shown at the time the said offer of performance was made, that the bankrupt was able and willing to perform according to the offer. An examination of the transcript and of the evidence will amply bear out that, at the time of the cancellation of the contract, said contract had a number of thirty-day installments that were in default, and these defaults became absolute; that there was a clear inability shown upon the part of the bankrupt to take care of any of these installments; that notwithstanding the notification to the respondent that there was certain moneys on deposit with an escrow company at Hermosa Beach, to take care of payments due, to the said Seller of said real property, who is the respondent in this case, that the records show, according to Mrs. Hill's testimony that her and her husband's situation had changed on account of serious difficulties that her husband

was involved in, that neither of them had the ability to take care of these payments, which were in absolute default on four thirty-day period payments, the defaults becoming absolute; that they were unable to take care of same, and that notwithstanding information conveyed by letter, by the then attorney for the said Hills, to the said Jennie Wuchner, that there was money on deposit in the escrow hereinabove referred to and/or in another escrow, that the evidence only shows one situation, and that is that in the first escrow, numbered 32, in the Hermosa Escrow Company, there was no moneys at all for the Wuchners, and in the second escrow there was no moneys on deposit for the said Wuchners; that there was no proper tender made at any time, or up to this time, to the Wuchners before the contract was cancelled.

6. The respondent further objects to the finding of the Referee and the Order based thereon that George T. Goggin, as Trustee in Bankruptcy, in the within bankruptcy proceedings, is the owner of said real property described as follows: [49]

“Lots 11, 12, 13, Block 173, of Redondo Beach in the City of Redondo Beach, County of Los Angeles, State of California, as per map recorded in Book 39, Page 1 of Miscellaneous Records of said County,

free and clear of any claims of the respondent Jennie Wuchner, that upon payment of the sum of \$5,035.43 by the said trustee in bankruptcy to the respondent Jennie Wuchner.”

7. The respondent further objects, as error, to the findings of the Referee on which he bases his order, that the Referee concludes that the contract herein in question is in full force and effect, and the Trustee in Bankruptcy, upon payment of the balance of the purchase price, is entitled to a conveyance of the property herein involved, etc. This would be making a new contract for the parties and would completely emasculate from said contract a provision that appears in this, as well as most real estate conditional contracts of sale, that time is of the essence of the contract; that upon the failure of the purchaser to comply with the terms thereof, and especially with the term of making payment, that the Seller shall be released from any obligations under said contract to convey title to said real property to the Buyer, and that any moneys paid under said contract shall be forfeited, as well as all other rights of the Buyer. The record is replete with a showing that there was absolute thirty-day effectual default periods, as well as defaults for the non-payment of taxes, but no proper tender was ever made for these payments prior to the cancellation, and, that therefore, the conclusion of the Referee, and the order based on same, setting out that the Purchaser, and/or his successor in interest, the Trustee in Bankruptcy, falls heir to a contract that is in full force and effect, and that, therefore, the Trustee in Bankruptcy, upon the payment of the balance of the purchase price, is entitled to a conveyance of the property herein involved, is wholly without [50] merit, legal, or otherwise, and not in keeping with the law and the facts in this case.

8. Jennie Wuchner, the Petitioner and Respondent, further objects to the Referee's finding and Order, hereinabove referred to, on the ground that the Court was wholly without authority to hear this particular cause, especially on a summary proceeding, for the reason that the District Courts, the United States Supreme Court, and, particularly, this United States District Court, in very recent decisions, has upheld the rule of law that the Court first obtaining jurisdiction over res retains it to the end, and that this rule prevails in bankruptcy, as well as in every other jurisdiction.

See cases cited by us in the Points and Authorities submitted before the Referee in Bankruptcy

In Re Greene-Halliday Co.,
(CCA 2) 57 Fed. (2nd) 173;

Priest vs. Weaver,
43 Fed (2nd) 57;

Pickens vs. Roy,
187 U. S. 177;

Eyster vs. Gaff,
91 U. S. 521.

Citing the case, with approval of
Greene-Halliday Co., *supra*;
Stratton vs. New,
283 U. S. 318.

See also,

Heath vs. Shaffer,
93 Fed. 647;

Linstroth vs. Ballew,
149 Fed. 960.

Upholding the doctrine that possession of res vests in the Court which first acquires jurisdiction with exclusive power to determine all controversies relating thereto. "Where the state suit is first this court has been in accord with others forbidding interference by the court of bankruptcy by summary proceedings."

See

In Re Greene-Halliday Co.,

57 Fed. 2nd 173;

Simons vs. Wells,

65 Fed. (2nd) 673;

Marcel vs. Engerbretson,

74 Fed. (2nd) 93-99.

The record will show that at the time the Referee in this matter attempted to exercise jurisdiction there was pending in the State Court a case filed by Jennie Wuchner, the Respondent [51] and Petitioner in this matter, which case was an action to quiet title to the real property in question here and to quiet the title of the said Jennie Wuchner to said property, same being the same property, and the same parties, as appears in these bankruptcy proceedings, save with the exception that a bankruptcy intervened before the matter was heard, and, as repeatedly held by the Federal Courts, where there is a bankruptcy, the construction and validity of a conditional contract of sale must be determined by the local laws of this State.

See

Bryant vs. Swofford Bros. D. G. Co.,

214 U. S. 279.

And where the State suit is first, this Court has been in accord with others forbidding interference by the Court of Bankruptcy by summary proceedings. Doctrine laid down in the cases previously cited, such as

Greene-Halliday Co.,

57 Fed. (2nd) 173;

Simons vs. Wells,

65 Fed. (2nd) 673;

Marcel vs. Engerbretson,

74 Fed. (2nd) 93-99;

Stratton vs. New,

283 U. S. 318.

Wherefore, your Petitioner prays:

1. For a review of said order by the Judge, and that said order be vacated and set aside; that the said Charles E. Hill dba Hill Machine Tools, and Dora Hill, and either of them, and/or George T. Goggin, as the Trustee in Bankruptcy of the said Charles E. Hill dba Hill Machine Tools, be held not to have any right, title, or interest in and to the real property described herein, as against Jennie Wuchner, the Respondent herein.

2. That Jennie Wuchner, the Respondent herein, who is also the Plaintiff in an action filed in the Superior Court for quiet title effecting said real property, by reason of the failure on the part of the Buyers therein to carry out the terms of said contract, be declared to be entitled to the rights that she seeks under said suit; that is, that her rights to ownership of said [52] property has not changed, and she is entitled to have said title quieted, as

against the claims of the Trustee herein and/or Charles E. Hill dba Hill Machine Tools, or any person claiming under either of the above-named parties, and that any moneys heretofore paid under said contract be declared, as provided for in said contract, forfeited, and the property of the said Jennie Wuchner, the Petitioner herein.

Your Petitioner respectfully again refers to the authorities submitted as hereinbefore set out by her, and respectfully asks that they be considered by the Judge of said United States Court before whom said Petition for Review shall be heard, and also respectfully asks that the Court, in reviewing the action of the Honorable Referee made in said matter, consider all of the papers, records, and exhibits filed in said matter, particularly the Answer of the said Jennie Wuchner to the Trustee's Order to Show Cause, Points and Authorities submitted by the said Jennie Wuchner before the hearing, and Additional Points and Authorities submitted after the hearing, as well as the entire record, including the Transcript of the proceedings taken before the Honorable Benno M. Brink at the various hearings in said matter.

Dated at Los Angeles, California, January 8th, 1947.

/s/ JENNIE WUCHNER,

Petitioner.

WILLIAM W. BEARMAN and
G. T. FOWLER,

By /s/ WILLIAM W. BEARMAN,
Attorneys for the Petitioner and Respondent, Jen-
nie Wuchner. [53]

State of California,
County of Los Angeles—ss.

I, Jennie Wuchner, the petitioner named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

/s/ JENNIE WUCHNER,
Petitioner.

Subscribed and sworn to before me this 8th day of January, 1947.

/s/ MEYER C. SOLOMON
Notary Public in and for the County of Los Angeles,
State of California. [54]

State of California,
County of Los Angeles—ss.

Jennie Wuchner, being by me first duly sworn, deposes and says: that she is the Petitioner in the above entitled action; that she has read the foregoing Petition for Review of Referee's Order by Judge and knows the contents thereof; and that the same is true of her own knowledge, except as to the matters which are therein stated upon her information or belief, and as to those matters that she believes it to be true.

/s/ JENNIE WUCHNER.

Subscribed and sworn to before me this 8th day of January, 1947.

[Seal] /s/ MEYER C. SOLOMON,
Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Filed Jan. 24, 1947. [55]

[Title of District Court and Cause.]

ORDER DENYING PETITION FOR REVIEW

A petition to review the order of the Referee dated December 5, 1946, was filed herein by Jennie Wuchner, a hearing was had on said petition, briefs were filed by counsel, and the matter was submitted to the Court for decision.

The Referee had jurisdiction to pass upon the question presented, and was correct in holding that the agreement of sale here involved is still in full force and effect and that the Trustee in this matter is entitled to a conveyance of the property upon payment of the balance of the purchase price.

This Court adopts the findings and conclusions of the Referee except that the portion of the finding Number Seven reading as follows:

“the said respondent Jennie Wuchner refused to accept the same and returned the monies to the Trustee herein, and the said monies evidenced by a check, have [56] been deposited with this court along with the rejection thereof as contained in Trustee’s Exhibit No. 3,”

is modified to read as follows:

“the said respondent Jennie Wuchner refused to accept the same and returned the check for said monies to the Trustee herein, and the said check has been filed with this court as contained in Trustee’s Exhibit No. 3.”

This Court adopts the Order of the Referee herein, except that the first sentence of Paragraph II, reading:

“That George T. Goggin as Trustee in the within bankruptcy proceeding, is the owner of the real property described as follows:”

is modified to read:

“That George T. Goggin as Trustee in the within bankruptcy proceeding is entitled to a conveyance of the real property described as follows:”

The Petition for Review is denied.

Dated this 16th day of December, 1947.

/s/ JACOB WEINBERGER,

United States District Judge.

Copies mailed to counsel 12/16/47.

Judgment entered and docketed Dec. 16, 1947, Book 47, Page 477. Edmund L. Smith, Clerk. By L. B. Figg, Deputy.

[Endorsed]: Filed Dec. 16, 1947. [57]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Jennie Wuchner, Respondent herein, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the Order Denying Petition for Review entered in this action by Jacob Weinberger, United States District Judge, on December 16, 1947.

/s/ WILLIAM W. BEARMAN,

/s/ RAYMOND B. McCONLOGUE,

Attorneys for Appellant.

Dated January 6th, 1948.

[Endorsed]: Filed Jan. 6, 1948. [58]

In the District Court of the United States for
the Southern District of California, Central
Division

No. 44,347

In the Matter of

CHARLES E. HILL, dba Hill Machine Tools,
Bankrupt,

JENNIE WUCHNER,

Appellant,

GEORGE T. GOGGIN, Trustee,

Appellee.

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

To the Clerk of the United States District Court for
the Southern District of California, Central
Division:

Jennie Wuchner, appellant herein, hereby designates the following portions of the record in the above entitled case to be certified to the Circuit Court of Appeals for the Ninth Circuit as the Record on Appeal:

1. Bankruptcy Petition—Order of Reference and Order adjudicating Charles E. Hill a bankrupt;
2. Amended Petition for Order to Show Cause re Jennie Wuchner, dated January 26, 1946.
3. Order to Show Cause re Jennie Wuchner, dated July 3, 1946.

4. Answer of Jennie Wuchner to amend the petition of George T. Goggin, Trustee of Bankrupt Estate of Chas. E. Hill. [59]

5. Reporter's Transcript of Hearing on Order to Show Cause by George T. Goggin, Trustee, vs. Jennie Wuchner, taken June 16, 1946.

6. Reporter's Transcript of hearing on Order to Show Cause by George T. Goggin, Trustee, vs. Jennie Wuchner, dated July 24, 1946, and August 14, 1946.

7. Reporter's Transcript of Hearing on Order to Show Cause by George T. Goggin vs. Jennie Wuchner, dated November 1, 1946.

8. Referee's Memorandum In re Trustee vs. Wuchner, dated November 18, 1946.

9. Respondent's objections to Trustee's Proposed Findings of Fact, Conclusions of Law and Order re Jennie Wuchner, filed December 2, 1946.

10. Findings of Fact, Conclusions of Law and Order re Jennie Wuchner, dated December 5, 1946.

11. Petition for Review of Referee's Order of December 5, 1946, filed January 10, 1947.

12. The following exhibits:

Trustee's Exhibits

(a) Agreement for sale of Real Estate.

(b) Notice with return registered receipt to Chas. E. Hill, signed by J. Wuchner.

(c) Copy of letter dated June 28, 1946, to Mrs. Jennie Wuchner, from Martin Gendel, with check in the amount of \$5,035.43, with notice

to Trustee, George T. Goggin, Martin Gendel, Chas. E. Hill and Dora Hill.

- (d) Letter dated February 14, 1946, to Mr. H. F. Poyet signed Mrs. Jennie Wuchner, with letter of February 11, 1946, to Mrs. Jennie Wuchner, signed by H. F. Poyet and escrow instructions. [60]
- (e) Letter dated February 11, 1946, regarding Escrow No. 32 to Angelus Escrow Service signed by Frank Bruno and Teddy Berg.

Wuchner's Exhibits

- (f) Notice to Chas. E. Hill dated February 8, 1946, signed Mrs. Jennie Wuchner with return receipt.

13. Order denying Petition for Review, dated December 16, 1947, signed Jacob Weinberger, United States District Judge.

14. Notice of Appeal filed January 6, 1948.

The points that will be relied upon by appellant on appeal are as follows:

1. That the Bankruptcy Court was without jurisdiction to try a matter determining title to real property in a summary proceeding, involving a stranger to the bankruptcy proceeding, while actions were pending in the State Court raising the same and other questions affecting the same property.

2. That the order of the Referee and the Findings of Fact and Conclusions of Law entered by him and the order of the United States District Judge confirming said order and Findings of Fact and Conclusions of Law are contrary to the evidence, not supported by the evidence and that said Findings of Fact and Conclusions of Law and said Order are illegal, unconstitutional and improper and not in accord with the law and facts in this case.

WILLIAM W. BEARMAN,
RAYMOND B. McCONLOGUE,
By /s/ RAYMOND B. McCONLOGUE,
Attorneys for Appellant.

[Affidavit of service by mail attached.]

[Endorsed]: Filed Feb. 10, 1948. [61]

[Title of District Court and Cause.]

CORRECTIONS TO DESIGNATION OF CON-
TENTS OF RECORD ON APPEAL

To the Clerk of the United States District Court,
for the Southern District of California, Central
Division:

George T. Goggin, Trustee, Appellee herein,
hereby designates corrections to the portions of the
record in the above entitled case as designated by

the Appellant in her designation of contents of record on appeal. Said corrections *our* underlined as follows:

1. Involuntary bankruptcy petition—order of reference and order adjudicating Charles E. Hill, a bankrupt.
2. Amended petition for order to show cause re Jennie Wuchner, dated July 3, 1946.
4. Answer of Jennie Wuchner to amended petition of George T. Goggin, Trustee of Bankrupt estate of Chas. E. Hill; filed July 18, 1946.
5. Reporter's Transcript of Hearing on Order to Show Cause by George T. Goggin, Trustee, vs. Jennie Wuchner, taken June 19, 1946.

Trustee's Exhibits

- (b) Notice with return registered receipt to Chas. E. Hill, signed by Mrs. Jennie Wuchner.

Dated this 13th day of February, 1948.

/s/ MARTIN GENDEL,

Attorney for George T. Goggin, Trustee and Appellee.

[Affidavit of service by mail attached.]

[Endorsed]: Filed Feb. 14, 1948. [64]

[Title of District Court and Cause.]

APPLICATION FOR ORDER TO CERTIFY
ORIGINAL EXHIBITS AND TRAN-
SCRIPTS TO CIRCUIT COURT OF
APPEALS

Comes now, Jennie Wuchner, appellant herein, and respectfully asks the Court under the provisions of Rule 75 "i" Rules of Civil Procedure, to allow the original exhibits and reporter's transcript of the evidence taken before the Referee herein be certified by the Clerk of the District Court to the Circuit Court of Appeals as the record in the above cause; that both the appellant and the appellee have copies of the transcript of the testimony taken before said Referee and also copies of the exhibits introduced as evidence at the hearings before said Referee; that it will only be necessary for the Clerk of the Circuit Court of Appeals to have printed a small portion of the transcript of the testimony taken before the Referee and that said original transcripts and original exhibits can be returned to the Clerk of this court as soon as the [66] record has been printed by the Clerk in the Circuit Court of Appeals.

WILLIAM W. BEARMAN and
RAYMOND B. McCONLOGUE.

By /s/ RAYMOND B. McCONLOGUE,
Attorneys for Appellant.

[Endorsed]: Filed Feb. 6, 1948.

[Title of District Court and Cause.]

ORDER

Now, on the 6th day of February, 1948, the application of the appellant for an order under Rule 75 "i," rules of Civil Procedure, to allow the original exhibits and reporter's transcripts of evidence be certified to the Circuit Court of Appeals, came on for hearing, and good cause having been shown therefor,

It is hereby ordered that the Clerk of the District Court certify the original exhibits and the original reporter's transcript of the evidence taken before the Referee to the Circuit Court of Appeals as the record of appeal in this case and that as soon as the Clerk of the Circuit Court of Appeals has printed the record on appeal, that said original transcripts and exhibits be returned to the Clerk of the District Court for the Southern District of California, Central Division.

Dated Feb. 6, 1948.

/s/ JACOB WEINBERGER,
Judge.

[Endorsed]: Filed Feb. 6, 1948. [68]

[Title of District Court and Cause.]

APPLICATION FOR ADDITIONAL TIME TO
FILE TRANSCRIPT OF RECORD AND
DOCKETING OF ACTION IN CIRCUIT
COURT OF APPEALS

Comes now, Jennie Wuchner, appellant herein and respectfully asks the court for additional time to file the Record and docket the above action in the Circuit Court of Appeals, and as grounds therefor shows the court as follows:

That the order of the United States District Judge from which this appeal was taken was entered on December 16, 1947; that notice of appeal was filed with the Clerk of the District Court on January 6, 1948; that appellants prepared and submitted to appellee an agreed "statement of the case" as provided by Rule 76 of Rules of Civil Procedure; that appellees refused to stipulate to said "agreed statement of the case"; that the time for certifying the record and docketing same in the Circuit Court of Appeals expires on [69] February 16, 1948.

Your appellant requests that said time be extended to March 15, 1948.

/s/ RAYMOND B. McCONLOGUE.
WILLIAM W. BEARMAN and
RAYMOND B. McCONLOGUE,
Attorneys for Appellant.

[Endorsed]: Filed Feb. 6, 1948. [70]

[Title of District Court and Cause.]

ORDER

The application of Jennie Wuchner, appellant, for an extension of time to file record and docket the above action in the Circuit Court of Appeals having been made and good cause therefor having been shown, the time for certifying the record in the above cause and docketing same in the Circuit Court of Appeals is hereby extended to March 15, 1948.

Dated Feb. 6, 1948.

/s/ JACOB WEINBERGER,

Judge, United States District
Court.

[Endorsed]: Filed Feb. 6, 1948. [71]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 71, inclusive, contain full, true and correct copies of Involuntary Petition in Bankruptcy; Order of General Reference; Order of Adjudication; Referee's Certificate on Petition for Review of Order in re Jennie Wuchner; Amended Petition for Order to Show Cause re Jennie Wuchner; Order to Show Cause re Jennie

Wuchner; Answer of Jennie Wuchner to Amended Petition of Charles E. Hill; Memorandum in re Trustee vs. Wuchner; Respondent's Objections to the Trustee's Proposed Findings of Fact. Conclusions of Law and Order re Jennie Wuchner; Findings of Fact, Conclusions of Law and Order re Jennie Wuchner; Petition for Review of Referee's Order by Judge; Order Denying Petition for Review; Notice of Appeal; Designation of Contents of Record on Appeal; Corrections to Designation of Contents of Record on Appeal; Application and Order to Certify Original Exhibits and Transcript and Application and Order Extending Time to Docket Appeal which, together with Original Trustee's Exhibits 1 to 5, inclusive and Original Wuchner Exhibit 1 and Original Reporter's Transcript of Proceedings on June 19, July 24, August 14 and November 1, 1946, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$18.70 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 3rd day of March. A.D. 1948.

[Seal]

EDMUND L. SMITH,

Clerk.

By THEODORE HOCKE,

Chief Deputy.

In the District Court of the United States for the
Southern District of California, Central Division

In Bankruptcy, No. 44,347-W

In the Matter of

CHARLES E. HILL, dba HILL MACHINE
TOOLS,

Bankrupt.

Before: Hon. Benno M. Brink,
Referee in Bankruptcy

REPORTER'S TRANSCRIPT OF HEARING
ON ORDER TO SHOW CAUSE BY
GEORGE T. GOGGIN, TRUSTEE, VER-
SUS JENNIE WUCHNER, JUNE 19, 1946

Appearances:

For the Trustee in Bankruptcy: Martin Gendel,
Esq., 607 James Oviatt Building, 617 South Olive
Street, Los Angeles 14, California.

For the Respondent Jennie Wuchner: William
W. Bearman, Esq., and G. T. Fowler, Esq., 306
Taft Building, 1680 North Vine Street, Hollywood
28, California.

For the Respondent Dora M. Hill and for Charles
E. Hill, the Bankrupt: Henry F. Poyet, Esq., 114
Pier Avenue, Hermosa Beach, California.

Los Angeles, California

Wednesday, June 19, 1946, 11 A.M.

The Referee: We will now take up the Hill
matter.

Mr. Gendel: In the Hill matter, the Court will
recall at the last hearing there was a problem as

to what would be done with reference to the position of the Trustee concerning the two Superior Court actions on file and the argument over the real property and one Jennie Wuchner. Since that time the Petition and Order to Show Cause filed and issued by the Court and served on the interested parties sets forth the position of the Trustee:

Mr. Bearman called me, said Mrs. Wuchner was a widow, eighty years of age and, in his opinion, unable physically to come to court and go through the rigors of examination in the court room. And I told him, so far as I was concerned, I would do everything I could to assist in taking the testimony in such a manner as to not jeopardize the health of Mrs. Wuchner.

That left us in the position where we knew we would not be ready to go ahead this morning with the Order to Show Cause. But we felt like we would like to present that problem to the Court and see whether the Court would have any suggestions.

We thought of two possibilities—one, take the testimony in the manner of a deposition; and I would go to her home. The other possibility would be to conduct a court hearing at her home and have the Court present, with a reporter, so that the Court could then observe the witness and hear the testimony.

The Referee: Let's settle first the question of jurisdiction.

Mr. Bearman: I think, your Honor, there is one question, and that is the question I want to state my position on. And that is there is a serious ques-

tion in my mind—and I am not prepared at this time to argue it—and that is the matter as to the jurisdiction.

This matter was started in the State Court, both the action to foreclose and then the action for declaratory relief. Irrespective of no answer having been filed in the action for foreclosure, when it was indicated to me there might be a Petition in Bankruptcy or something, I never took any default. I have not proceeded, even with the matter in such state, to take any default. And I want to state, without any restraining order, on account of my respects for this particular defendant and respects for myself, I will state, without orders, I will not proceed to do anything until it is determined just what procedure is to be followed.

The reason there is a serious question about jurisdiction is this. Without being a bankruptcy expert, I take it that the law with reference to matters of this kind is this: That where actions have been filed and are pending in the State Courts and a bankruptcy intervenes that if the Bankruptcy Court, that the Trustee in Bankruptcy comes in and takes title subject to the advantages and the disadvantages and disabilities, he steps into the shoes of the bankrupt as of the date—in other words, the State Court would have a right to proceed to follow up and carry out the procedure unless possession of certain properties came under the administration of the Bankruptcy Court.

As to whether or not there was possession in this case is a serious question. Frankly, our position

that we maintain is this: We had brought this action to foreclose on a conditional contract of sale. And, without arguing the equities here, we have an old lady here, about eighty years of age.

There is a default in payments, of a few payments. It is not like we are trying to grab somebody's property. That is not our position at all.

If this petitioner—and I say this without any reflection upon what has taken place—gets into very serious difficulty, is sentenced to San Quentin—they can't carry on the terms of that contract and declare it at an end, and we will attempt to show that. And then there is a question of increase in the real estate market, and whether or not there can be no moneys for creditors and for attorneys and what not. There is an attachment levied on this particular property. And, I think I am correct, I think I may say that the attaching creditor—and I say this without any reflection upon the gentleman who was the attorney, who formerly represented Mr. Hill, for his claim of seventeen hundred or eighteen hundred dollars for a balance of the fee.

We proceed, frankly, under our contract, which provides title shall not vest and also on the theory the contract has been terminated, to clarify the title, in so far as this old lady is concerned. That is all the question that is involved here and to carry out what the parties agreed among themselves and this contract which she could not carry on was at an end.

In view of this we filed our action. We served notices, using our procedure which has not only been regular, but within the law. Meanwhile there

is an action for declaratory relief filed by an attorney, and in addition, there being no answer to our action on the foreclosure, under which the attorney sets out that the rights as to the parties are unsettled and, among many other claims he makes, he also claims he is entitled to \$20,000 for damages for certain actions we took in not taking what they alleged to be a tender, all of which we deny.

Of course, I make this statement, and I think lawyers sometimes use a great many pages in pleading and use a lot of words, but I think Mr. Gendel, who is a very good lawyer, and he has not been able to figure out this question of damages. And, to my mind, I raise this query, as to how we could have damaged the bankrupt in this case for the sum of \$20,000 or any other amount, when the only asset that they claim as part of this estate, the only asset they claim as part of this estate, is the only thing that would furnish money, all around for everybody.

The reason I say the question of jurisdiction is a very serious one is this: I don't admit, I would say this, that if the Trustee in Bankruptcy came in possession of certain properties, then I would have to say, if your Honor please, that the Bankruptcy Court would have a right to hear that matter and adjudicate its claims, whatever they may be. But if my position is sound, that even though a Receiver or a Trustee or an officer of the Bankruptcy Court, is in physical possession—I may be wrong on this statement—if he is there without any right and there is no legal title in the bankrupt,

then the fact that a Trustee is in physical possession of a property of which he has no title does not give jurisdiction and does not give possession to the Bankruptcy Court.

All I want to say is this, whether this matter is to be tried here or in the State Court, all we want is our day in court.

I might state very frankly the reason I am taking the position of not wanting to enter into any stipulations in this matter, with reference either to admitting jurisdiction of this Court or taking away any performed rights so far as my client is concerned, is this: Whatever your Honor should rule—and I make those very points, furthermore, as to jurisdiction—whether it is in this department or whether it is in the State Court, I shall abide by that and be willing to try out the issues, either here or in the State Court.

Frankly, I think the jurisdiction is in the State Court. But the statement Mr. Gendel also made, with reference to an old lady, I know this of my own knowledge, because I have gone there any time Mrs. Wuchner has any papers to sign. She is close to eighty and hardly able to walk. And I think neither you nor I would want to take the responsibility of trying to get her to come down here. Something serious might happen.

I will say, and I think that is what Mr. Gendel has in mind, without making any stipulation, I will not proceed while Mr. Gendel and I are trying to work out what may be a practical situation. I haven't done that; I will not at all while we go along.

I think, as your Honor pointed out, the question of jurisdiction should be settled and the question as to what the State procedure is should be settled. My only suggestion, from a practical point of view, is that the matter go over for a reasonable time, that we then present—so far as I am concerned, I am willing to present opposition by way of an answer and authorities. And when your Honor has ruled on the question of jurisdiction and given us our day in court, whether it is here or whether it is in the State Court, we will be willing to proceed. And, I might add the addition to the statement I have made, that even pending that and without any restraining orders restraining us, we shall not proceed on any phases of the actions that are pending in the State Courts, so that the rights of any creditors, of anybody involved in this matter, will be conserved.

Mr. Gendel: At this time, on behalf of the Trustee, I would like a ruling on the question of jurisdiction.

I may have misunderstood Mr. Bearman. I thought the question of jurisdiction had been settled and if the Trustee sought to present the matters before a Court we would have it presented here.

I appreciate his position. I think we should not be left in the dark as to whether the position of the Trustee is correct as to the jurisdiction of this Court. And I will point out in support of our position, the Trustee has physical possession, the Trustee has succeeded to the rights of the bankrupt in the contract. The total amount of the balance of

the contract has been tendered, and the Trustee does now tender that total amount, so that there is no question about the fairness of our position.

The State Court proceedings are only in a beginning stage. Nothing has been done there which would justify this Court, in exercising its discretion, in feeling that enough had been accomplished in the State Court to support a ruling of this Court that they should continue, which would be in the discretion of your Honor. I feel, in view of the few pleadings in the State Court, that we should have this matter decided here as a Court of Bankruptcy administering bankrupt assets. I think this matter should be decided in such a way that the Trustee will know what his problems are.

Mr. Bearman says he is in no position to stipulate for the party in this State Court action. I think we might as well have a ruling from the Court.

Mr. Bearman: I serve upon the Trustee at this particular time the Answer of Jennie Wuchner. And I would like to file the original of the Answer in this particular case.

On the question of jurisdiction I misunderstood Mr. Gendel that, for all purposes, this matter was going over. I do not object to the Trustee in Bankruptcy making his ruling on the question of jurisdiction. I am not prepared at this time, frankly, on account of the position I have taken, to argue that matter. But I would say this, that I think before we proceed to carry out the procedure as we have outlined, that first question should be settled.

The Referee: I think we can settle that now. If it is agreeable, the Court may settle the question of jurisdiction.

Mr. Bearman: I do not want to be foreclosed from presenting some authorities and also arguing the matter, and I am not prepared at this time.

The Referee: Let's discuss the matter and see if we have all the facts before us. There is not any question but what the bankrupt was in physical possession, whether he was there with right or without right, he was there. Is that right? At least, he had constructive possession?

Mr. Bearman: I will say this, without answering that question.

Mr. Gendel: Why don't you answer it yes or no?

Mr. Bearman: I will answer the question. I am not trying to straddle. Your Honor asked a very frank question. I might answer it this way: The bankrupt was in San Quentin and he was not over in that place. Now, there was an attachment by one of his creditors. Then there is a bankruptcy that intervenes, and a Receiver is appointed, but prior to the time of all of these proceedings. I won't say it is not a matter that your Honor can't pass on. I say very respectfully to this Court—not in any disrespectful way—that we cannot lose sight of this elementary principle, and that is this: I think it is fundamental that a Trustee in Bankruptcy does not get any greater title than the bankrupt himself had.

In other words, so far as the rights of the bankruptcies are concerned, prior to the time of his bankruptcy if he had no title in any real property, the

fact that a bankruptcy intervenes and a lot of creditors come along does not give the Trustee in Bankruptcy any greater rights than the bankrupt himself had.

What are the facts of this particular thing? We maintain this position: We maintain that the bankrupt, even though fifteen or twenty men went into possession, were occupying the same premises, without any legal right, that their rights had ceased, that there was no title. It is our position their rights had ceased. And, if our position is correct, then there is no right of the Bankruptcy Court to administer a title that they haven't got.

The Referee: Changing it the other way, was your client in possession on April 5, 1946, when this bankruptcy began?

Mr. Bearman: I would say, frankly, I would say this, I would say in legal possession. I would not say in physical possession.

I will point out to your Honor: A is the owner of certain property, real property. He enters into a contract with B, that B is to buy this property, but the title is always in A until B has completed payments, and done this and that, and so forth. The contract itself provides time is the essence of the contract, and if there is failure on the part of B to carry out the terms of the contract, there is no right on the part of B to ask that title vest in him; and all rights in the contract cease.

The Referee: Supposing we give you an opportunity to see if you can find any authorities to support that legal position?

Let's move to another thing. What interest, if any, does Dora Hill have in this property?

Mr. Bearman: Dora Hill happens to be the wife of the gentleman who is confined in the penitentiary, up North.

Mr. Gendel: I found that the action for damages sets forth Dora Hill as one of the plaintiffs, although the property itself is supposed to be recorded in the name of Charles Hill, and to eliminate any community property claim——

The Referee (Interrupting): Is Dora Hill a party to the contract, as such?

Mr. Bearman: I think the contract was signed by Charles Hill. But irrespective, I think it is mentioned in Mr. Gendel's Petition, and that is by reason of the community property law. But answering your question, the contract is signed by Charles E. Hill.

The Referee: What is the position of the Trustee here? Is he seeking or asking for a decree of Court to the effect that Mr. Bearman's client has no right, title, or interest, or is he asking for that and also a decree that Mr. Bearman's client is obligated to this estate for certain damages?

Mr. Gendel: Our primary prayer for relief is for quieting title to the property and setting up a method of paying off the balance coming to Mr. Bearman's client. We set up the question of damages in the event Mr. Bearman's client is willing to concede the jurisdiction of the Court to hear that problem. And, we will thresh it all out at one time. If not, we will have to reserve the question of damages for a State Court action.

The Referee: Before you would present the question of damages to this Court—I can't tell from this Petition just what you base your claim for damages on. If the Bankrupt before bankruptcy concedes that the property had been lost by him and then said that because of the loss he was damaged, then perhaps there is no further controversy over the ownership of the property.

Mr. Gendel: That is not the situation.

The Referee: Unless the property was lost how could the bankrupt assert damages, if he still had the property? Do you say because of this foreclosure proceeding he was prevented from making a sale of the property at a profit of \$20,000, which profit he can no longer realize? You don't set up any of these elements.

Mr. Bearman: The question your Honor has raised, you can't simply take those two actions that are pending in the State Courts and say—after all, those have to be settled, either here or in the State Court. The question your Honor has asked is a question that nowhere appears, either in the Petition of the Trustee or in any other actions that are filed.

That is the reason, if you will note, in the first part of my statement to the Court, I made this statement, that they are asking for \$20,000 damages. I am not an authority upon the law of damages, but damages are not just picked out of a hat, like a magician picks them out. They are not speculative. You don't pick them out of nowhere. We all know you cannot recover for any damages that

might be speculative, but on the face of all the pleadings they have filed in this particular matter, I make the statement, without disrespect to eminent counsel, their claims are absolutely silly, for this reason; they set out they have been damaged to the extent of \$20,000 for property we claim we still have, is worth more than you sold it to us for.

They don't set out that "because you sold me certain property and you prevented us from making sales we lost so and so." But they say, "No, we are in possession of property that is worth more than you sold it to us for and we have been damaged to the extent of \$20,000."

I don't see this new order of things. You must have a premise for asking it. Assuming we were litigating this thing, and your Honor had possession and the title of this property is in the hands of the Hills, and I give them \$20,000 worth of damages. This property was bought for \$5500 and it can be sold for so and so, sold at a profit. Where are the damages? The title is still in them.

We have those actions. They must be disposed of. And, it seems to me it is not asking—and I place myself in this position, and I think we all have the right to deal that way, and I would deal that way with Mr. Gendel, and I would certainly deal that way with Mr. Poyet—no rights of any creditors would be harmed. I did not take any action with any restraining orders against me and I did not move, because I knew these things were coming. I shall still maintain that position. But I think we should decide the question of jurisdiction and then go forward.

The Referee: Has there been any tender of the amount to your client?

Mr. Bearman: We have in verified answers filed in the Superior Court denied, under oath, that there has been any tender made to us.

The Referee: Mr. Gendel, has there been any tender made?

Mr. Gendel: For the Trustee?

The Referee: Yes.

Mr. Gendel: No, except in the pleadings, the tender of the amount of any——

The Referee (Interrupting): Is that sufficient? Has the Trustee got the money?

Mr. Gendel: The only place the Trustee will get it is from the sale of the property.

The Referee: This lady certainly is entitled to her money. You mean to say we have the right to come in here and go into it to the extent of trying to determine the rights of the parties and finally come to the question of how the owner is going to receive money for this title, payment of \$4900, and the Trustee hasn't got the money? Maybe I do not know much about the law of tender.

Mr. Gendel: The position taken by the bankrupt and his counsel prior to bankruptcy is that a full and legal tender was made. We have had turned over to the Trustee certain documents which confirm that. The Trustee has in his Petition acknowledged the willingness and the desire to pay those moneys. We have alleged that the property is worth in excess of the balance owing, and that

is the reason this poor old lady is so anxious to get back. All my sympathy stops with her physical condition only. There is nothing more for the Court to decide than in the ordinary situation, as to whether or not a party has a lien or title. If the party has a lien the property will either be sold and the lien paid or if there is not enough there to pay it, the property will be turned back to the lien claimant.

The Referee: It has not been denied that time is the essence of this agreement. Under those circumstances, don't you have to keep the tender good? Can the Court make a decree that the purchaser is entitled to a deed upon the payment of so much money if it has not been, in effect, paid up, a continuing tender; has the Court got jurisdiction, in view of the terms of the contract, to give any further time for the payments?

Mr. Gendel: The tender has been made.

The Referee: It has not been kept good.

Mr. Bearman: Of course, Mr. Gendel, I think I am—and I say this respectfully, I think I am more conversant with this situation than Mr. Gendel is. I have had something to do with it from its very inception. And this particular matter is no different than at the Bank of America or any of the banks here, or any of the Trustees that hold contracts. And, irrespective of the statements that have been made, I have no sympathy for this little old lady outside of the fact that she wants her money.

I think the equities are with my client on this particular matter. And rather than get tied up on

a matter involving everything, she took the position she was entitled to carry out this contract on the terms and conditions made.

It is elementary you cannot talk about a tender and say, "I am willing to do so and so." But a tender means one thing—there is \$10,000 due on this contract. Say, if you go to the Bank of America, in San Pedro, there will be \$10,000 waiting for you, if you call so and so, at 10 o'clock a.m., on the 15th of June. And on June 15th, at 10 o'clock a.m., there is \$10,000 due. That is not a tender. A tender is one that is obligated to make a payment on that particular time, he comes up with lawful money of the United States. And they all specify to whom the money is owed and where to tender that money.

I might say I do not want to embarrass Mr. Gendel because of the fact that they don't have much money in their pocket. The Trustee says, "We will give you the money." I know nobody brings that money with them. But we have a verified complaint denying that tender was made. There has never been any tender, kept alive. If I tender certain things due under a contract and then sit by and don't do anything else, I have not completed what the law of tender is. And if you will look in the books you will find in order to keep that tender alive, that has to be placed to the credit of the one to whom that money is owed.

So we find here this situation, that A says that there was money tendered to us. I am not sure about this situation, where the Trustee goes in—

and we deny there has been a tender. We set out, if you get my point, if the bankrupt had no title and the rights had ceased, and time was the essence of this contract, the mere fact that there are a lot of creditors, among whom is the attorney who defended him on a \$1700 claim, and I am not saying this in disrespect to the attorney, and certain other creditors—that after the rights of the bankrupt ceased the mere fact that there is a bankruptcy, if there isn't any title, then the Trustee does not get any title greater than the bankrupt has.

The Referee: Is there any automatic right of reinstatement on a contract of sale of real property, such as, for instance, on the foreclosure of a deed of trust, where certain installments have not been made?

Mr. Bearman: It cost me a lot of money, that I couldn't subdivide Los Angeles and I couldn't control the real estate market. As your Honor knows, in a mortgage we have an equity of redemption for a year; in a trust deed there is no equity of redemption.

The Referee: Yes, but——

Mr. Bearman: A contract, of course, a contract, just as your contracts under which they buy automobiles, under which they buy washing machines, under which they buy real estate, which sets out that the title is in the seller, and he never passes the question of title until the terms of that contract has been met.

Your Honor must bear this in mind—there is no transfer of title until the purchaser has met, has carried out the terms of the contract. And if he does not carry out all the terms of the contract—and time is made the essence of the contract—there is no duty upon the seller to transfer title to the purchaser. There is not any equity; this title does not pass.

The Referee: All right, now the prayer of this Petition prays this Court issue an order directing Jennie Wuchner and Dora Hill to appear and show cause why the rights of the parties should not be determined by this Court, as hereinbefore set forth; and why the title to said real property should not be declared vested in the Trustee, free and clear of any claim of Wuchner and Dora Hill; and to show cause why the said parties should not be restrained from proceeding with either Superior Court action, pending the determination by this Court of the rights of the parties, and why this Court should not grant Petitioners such other and further relief as may be proper, and so forth. And, includes reference to the action for \$20,000 damages.

Mr. Gendel: Let me make this clear, so that there is no necessity for any ambiguity in the record. In order to present the question of jurisdiction without any possible ambiguity, I think the Trustee's position on this Petition, without prejudice to such rights as might arise on the question of damages, should be solely limited to the question of determining the rights in this piece of property only

pursuant to the contract, and we will have no room for any possible review on the question of jurisdiction.

The Referee: Then I think you should file an Amended Petition and indicate the course you are going to pursue, because in the present Petition two questions are involved. One is the title to the property; and another is the liability of Mr. Bearman's client for damages. We might conclude we had jurisdiction on the question of the title of the property and we might conclude we did not have any jurisdiction on the question of liability of Mr. Bearman's client for damages. You have been through it on the question of jurisdiction to render judgments against persons who appear in the Bankruptcy Court.

Mr. Gendel: Yes, I had a hand in making the power of the Referee a little broader——

The Referee (Interrupting): That claim was on objection to a claim. A claim was asserted, and the Trustee pleaded an offset greater than the amount of the claim. That is a little different. Mr. Bearman's client is not coming into court. Mr. Bearman's client is being brought into this court. Does that give the Court jurisdiction to render an affirmative money judgment against Mr. Bearman's client?

Mr. Gendel: Having gone through that problem and probably having read about as many authorities in the Federal Courts as there are on the question, it is my desire if Mr. Bearman feels his client will be benefitted by having two trials instead of one, to amend the prayer, and we will do it the hard way.

The Referee: You can set it up any way you want, but I think you should set it up specifically.

Perhaps Mr. Bearman at the last minute might concede jurisdiction.

Mr. Gendel: I would rather not play games. We will separate them and we will proceed in that way.

The Referee: I will give the Trustee whatever time is reasonably needed to file an Amended Petition and then set it for hearing, at which time Mr. Bearman, if so advised, may make formal objections to the jurisdiction of the Court and be prepared with such authorities as he may wish to present.

How much time do you want?

Mr. Gendel: Getting it dictated and typed, I would say two weeks time.

Mr. Bearman: I want to get that straightened out. Two weeks passes very quickly. Let's make it three weeks. And I think that the way the Court expressed it is the best way to meet these issues.

May I make one inquiry?

The Referee: Yes.

Mr. Bearman: What is going to happen to those two actions that are pending in the State Court? Will they be heard? Whatever Court should be decided has jurisdiction, if the State Court and the issues involved in this action are tried, or, if it is determined that this Court has jurisdiction, will this Court hear those actions?

The Referee: We will not hear the actions as such. We will hear the issues raised by the actions.

Mr. Bearman: What will happen to those actions?

The Referee: If the decision on the question of title should be against your client, making an order requiring your client to dismiss those actions, as part of the proceedings here. In the meantime I think those actions will automatically stay in status quo. You realize, in the light of this pending bankruptcy, you cannot get a clear title in your State Court proceeding without making the Trustee a party.

Mr. Bearman: Might I say this, Mr. Poyet never filed an answer in the quiet title action, and I never sought to take the default.

The Referee: On the second action, that for damages, being an alleged damage to property, it is my understanding it passes to the Trustee in Bankruptcy, under Section 70 of the Bankruptcy Act. So, the Trustee will not attempt to prevent that action at the moment. If Dora Hill should attempt to prosecute that action singly, upon sufficient showing, this Court would undoubtedly restrain her for the time being.

I will give Mr. Gendel to July 5th to file an Amended Petition. And when shall we then set it for hearing?

Mr. Bearman: I would say three weeks. Mr. Gendel and I might try to see what we could work out.

The Referee: The Trustee may have to and including July 5th to prepare and serve an Amended

Petition, and the Amended Petition will come on for hearing Wednesday, July 17th.

Mr. Bearman: That is agreeable.

The Referee: The first meeting, I will continue to the same date unless there is some objection.

Mr. Gendel: I think we should do that.

The Referee: Mr. Gendel has until July 5th to serve on you and file an Amended Petition, and that Amended Petition will come on for hearing on July 17th.

(Whereupon at 12 o'clock noon a recess was taken in this matter to July 17, 1946.)

State of California,
County of Los Angeles—ss.

I, O. Edgar Abbott, Official Court Reporter, hereby certify that the foregoing 25 pages comprise a full, true, and correct transcript of my stenographic notes taken before Hon. Benno M. Brink, Referee in Bankruptcy, in the Matter of Charles E. Hill, dba Hill Machine Tools, Bankrupt, No. 44,347-W, on the 19th day of June, 1946.

Dated this 13th day of January, 1947.

/s/ O. EDGAR ABBOTT,
Official Reporter.

In the District Court of the United States for
the Southern District of California, Central
Division

In Bankruptcy

No. 44,347-W

In the Matter of

CHARLES E. HILL, dba HILL MACHINE
TOOLS, Bankrupt.

Before: The Honorable Benno M. Brink,
Referee in Bankruptcy.

REPORTER'S TRANSCRIPT OF HEARING
ON ORDER TO SHOW CAUSE BY
GEORGE T. GOGGIN, TRUSTEE, vs. JEN-
NIE WUCHNER, ON NOVEMBER 1, 1946

Appearances:

For the Trustee in Bankruptcy: Martin Gendel,
Esq., 607 James Oviatt Building, 617 South Olive
Street, Los Angeles 14, California.

For Respondent Jennie Wuchner: William W.
Bearman, Esq., and G. T. Fowler, Esq., Suite 306
Taft Building, 1680 North Vine Street, Los Angeles
28, California.

For Respondent Dora M. Hill and for Charles E.
Hill, the Bankrupt: Henry F. Poyet, Esq., 114 Pier
Avenue, Hermosa Beach, California.

* * * * *

TRUSTEE'S EXHIBIT No. 1
AGREEMENT FOR SALE OF REAL ESTATE

This Agreement, made and entered into this 5th
day of June, 1945, between Jennie Wuchner, a

widow, hereinafter called the Seller, and Charles E. Hill, hereinafter called the Buyer,

Witnesseth: That the said Seller in consideration of the covenants and agreements hereinafter contained and made by and on the part of the Buyer, agrees to sell and convey unto the said Buyer, and the said Buyer agrees to buy all that property in the City of Redondo Beach, County of Los Angeles, State of California, described as:

Lots 11, 12 and 13, in Block 173, of Rendodo Beach, in the City of Redondo Beach, County of Los Angeles, State of California, as per map recorded in Book 39, Page 1, Miscellaneous Records of said County.

Subject to: Covenants, conditions, restrictions, reservations, rights, rights of way and/or easements, if any, of record,

for the sum of Fifty-five Hundred Dollars (\$5500.00), lawful money of the United States, and the said Buyer, in consideration of the premises, agrees to buy and pay the sum of Fifty-five Hundred Dollars (\$5500.00) as follows to-wit:

\$350.00

\$149.38 upon the execution and delivery of this Agreement, receipt of which is hereby acknowledged, and the further sum of Two Hundred Dollars July, (\$200.00) or more on or before the first day of June, 1945 and two hundred dollars (\$200.00) or more on or before the first day of each calendar month thereafter until the sum of Fifteen Hundred Dollars (\$1500.00) shall have been paid on the principal sum,

together with interest thereon at the rate of 6% per annum. Each payment shall be credited first on interest then due and the remainder on principal; and interest shall thereupon cease upon the principal so credited. Should default be made in payment of any installment when due the whole sum of principal and interest shall become immediately due at the option of the Seller. If action be instituted on this contract, Buyer to pay such sum as the Court may fix as attorney's fees whether such action progress to judgment or not.

The Buyer shall be let into, and have immediate possession of said premises, but the Buyer shall make no changes or alterations in or to any of the buildings now on said premises, nor remove any portion thereof, without the consent of the Seller therefore, until after the sum of Fifteen Hundred Dollars (\$1500.00) has been paid on the principal sum of the purchase price herein specified; and it is agreed that time is the essence of this Contract, and in the event of failure to comply with the terms hereof by said Buyer, then the Seller shall be released from all obligations of law and equity to convey said premises, and the Buyer shall forfeit all right thereto and to all money theretofore paid under this contract; but the said Seller on receiving full payments, at the time and in the manner above mentioned, agrees to deliver to the said Buyer a policy of Title insurance, showing the title to said property to be vested in the Seller, free of incumbrance except as above stated and to execute and deliver to the said Buyer, or assigns, a good and sufficient deed of grant, bargain and sale.

It is further agreed that immediately after said Fifteen Hundred Dollars (\$1500.00) has been paid on the principal sum due herein, Seller agrees to deliver to said Buyer, a policy of Title Insurance showing the title to said property to be vested in the Seller free of incumbrances except as above stated, or as may be created or suffered by Buyer and to execute a good and sufficient deed to the Buyer and the Buyer agrees to execute to Seller a note secured by a Trust Deed on the premises for the balance due under this Contract, payable in installments of Fifty Dollars (\$50.00) or more per month, with interest at the rate of 6% per annum.

1945-46 taxes to be paid by Buyer and Buyer shall pay all subsequent taxes due on said property and all assessments of whatsoever nature which may become due on said property, insurance to be pro-rated as of this date, and Buyer shall keep the buildings on said premises insured until said property is paid for.

Buyer shall not assign any interest under this Contract without the written consent of Seller.

It is mutually agreed that the provisions of this Contract shall apply to and bind the heirs, executors, administrators and assigns of the parties hereto.

Witness our hands this 5th day of June, 1945.

/s/ CHARLES E. HILL,

/s/ MRS. JENNIE WUCHNER,

Seller,

/s/ CHARLES E. HILL,

Buyer.

It is further agreed that any default shall not become effective for Thirty Days (30) from date of said default.

/s/ MRS. JENNIE WUCHNER,
Seller,
/s/ CHARLES E. HILL,
Buyer.

State of California,
County of Los Angeles—ss.

On this 22nd day of January, A. D. 1946, before me, H. F. Poyet, a Notary Public in and for said County and State, personally appeared Charles E. Hill, known to me to be the person whose name is subscribed to the within Instrument, and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] /s/ H. F. POYET,
Notary Public in and for Said
County and State.

My Commission Expires Dec. 5, 1949.

PAYMENTS

Date Paid	Date Due	Amount	Credited on	Balance
M. D. Y.	M. D. Y.	Paid	Interest Principal	of Prin. Unpaid
7/ 1/45				5500.00
7/ 2/45		350.00	350.00	5150.00
8/ 1/45	8/ 1/45	200.00	25.75 174.25	4975.75

TRUSTEE'S EXHIBIT No. 2
NOTICE

To Charles E. Hill:

You Will Please Take Notice that the undersigned, Jennie Wuchner, designated as the "Seller" in that certain Agreement drawn between the undersigned as "Seller" and Charles E. Hill as "Buyer" on the 5th day of June, 1945, providing for the sale and purchase of real property located in Redondo Beach, County of Los Angeles, State of California, as more particularly described in said Agreement, hereby notifies you:

That there having been default in the payment of installments provided for in said Agreement on the part of the Buyer, the Seller hereby exercises the Option contained therein and declares the whole amount of principal and interest now due and unpaid under said Agreement namely the sum of \$4912.63 due and hereby demands that you pay forthwith to the Seller the said sum of \$4912.63, being the principal and interest now due and unpaid.

Dated this 5th day of February, 1946.

/s/ MRS. JENNIE WUCHNER.

[Postoffice Department Return Receipt No. 2569 for registered article attached.]

[Letterhead Martin Gendel, Attorney at Law.]

Re: Charles E. Hill, Bankrupt

In order that there may be no question concerning the willingness of the trustee to complete the tender of monies heretofore made to you by the bankrupt, enclosed herewith you will find the check of George T. Goggin, as Trustee of the estate of Charles E. Hill, bankrupt, which check is countersigned by Benno M. Brink, Referee, being check No. 5, in the sum of \$5,035.43, being dated June 27, 1946.

This check is tendered in full payment of all monies owing on the Charles E. Hill sales contract covering the real property and improvements thereon as described in said contract dated June 5th, 1945.

The amount is computed in the following manner: Principal and interest, as requested by you, in the sum of \$4,912.63, as demanded by your notice of February 5th, 1946, with interest thereon at the rate of 6% per annum to and including the date of tender of same.

The undersigned is the attorney for George T. Goggin, Trustee in said bankruptcy, and makes this tender on behalf of George T. Goggin, Trustee, and on behalf of said estate.

Very truly yours,

MG:DA

MARTIN GENDEL.

Encl.

DO NOT DETACH

Pmt in full & settlement
of all claims of Jennie
Wuchner re written agree-
ment for purchase of real
property & improvements
thereon

11878

10

THE FARMERS AND MERCHANTS
NATIONAL BANK OF LOS ANGELES

16-1 LOS ANGELES, CALIFORNIA

12

11878

GEORGE T. GOGGIN

TRUSTEE IN BANKRUPTCY
517 H. W. Hellman Bldg.

MU. 2248

NO. 5

PAY TO
THE ORDER OF
LOS ANGELES, CALIF., June 27, 1946

JENNIE WUCHNER

\$ 5,035.43

FIVE THOUSAND THIRTY FIVE and 43/100 - - - - DOLLARS.

RECEIVED
CHARLES E. HILL, dba
HILL MACHINE TOOLS

REGISTERED TRUSTEE OF THE ESTATE

Wm. H. Hill

COUNTERSIGNED

REFeree

BANKRUPT

511 North Elena
Redondo Beach, California
July 1, 1946

George T. Goggin, Trustee in Bankruptcy, for
Charles E. Hill and Charles E. Hill, doing
business as Hill Machine Tools.

Martin Gendel
Attorney at Law
617 South Olive Street
Los Angeles 14, Calif.

Charles E. Hill and Dora Hill, c/o Martin Gendel,
Attorney at Law, 617 South Olive Street, Los
Angeles 14, Calif.

There has just received by me in a letter dated
June 28th, a check dated June 27, 1946, in the sum
of \$5,035.43. This check was accompanied by a let-
ter, copy of which is herewith enclosed. Answering
this letter, I desire to say, as I have said in verified
Answer filed in the Superior Court in Case No.
511,064, entitled, Charles E. Hill and Dora Hill,
Plaintiffs vs. Jennie Wuchner, a Widow, Jane Doe,
John Doe and Doe Corporation, Defendants, that
there was never any tender of moneys made by the
bankrupt and/or Dora Hill, and/or anyone in their
behalf, and that the undersigned commenced an ac-
tion in the Superior Court of the State of California,
No. 501-751 entitled Jennie Wuchner vs. Charles E.
Hill and Mrs. Charles E. Hill; that said action was
filed on the 19th day of February, 1946, after the
undersigned had declared the principal and interest
due under a contract for the purchase and sale of

certain real estate, as set out in said complaint, and that no answer has ever been filed to said action, which is an action to quiet title and for failure to comply with the terms and conditions of said contract and that, although time is made the essence of said contract, and the said Charles E. Hill and Dora Hill were notified of defaults in the contract and of the total amounts due, said defaults were not cured nor payments made, nor tenders made, and that the undersigned, pursuant to the terms of said contract, elected to declare the amount of principal and interest due and brought said action after notices to quiet title to said property referred to in said action No. 510,751. This action to quiet title is still pending in the Superior Court of Los Angeles County and, as hereinabove set out, no answer has ever been filed in said action by the said Charles E. Hill, or Charles E. Hill doing business as Hill Machine Tools and/or Dora Hill; and that since said action a petition in bankruptcy was filed against Charles E. Hill doing business as Hill Machine Tools.

There was also an action for declaratory relief, filed in the Superior Court after the action hereinabove referred to was filed, in behalf of Charles E. Hill and Dora Hill against Jennie Wuchner, et al., in which said action Jennie Wuchner filed a verified answer. This action is still pending in the Superior Court of Los Angeles County and has not been disposed of.

The undersigned advises you that, pursuant to that contract, in which time was made the essence

of the terms thereof, in event of failure to comply with the terms thereof by said buyer, namely, Charles E. Hill, then the seller, Jennie Wuchner, shall be released from all obligations in law and equity to convey said premises to buyer, and the buyer shall forfeit all right thereto. This contract was entered into on the 5th day of June, 1946, and; as set out above, there having been defaults, the said Jennie Wuchner filed her action as hereinabove set forth.

For the above reasons, the undersigned is returning to you the above referred to check.

Respectfully yours,

JENNIE WUCHNER,

By /s/ WILLIAM W. BEARMAN,

Her Attorney.

WWB:ft

Encls

(Copy)

[Letterhead Martin Gendel, Attorney at Law.]

June 28, 1946.

Mrs. Jennie Wuchner

c/o Wm. W. Bearman, Esq.

1680 N. Vine Street

Los Angeles 28, Calif.

Re: Charles E. Hill, Bankrupt

Dear Madam:

In order that there may be no question concerning the willingness of the trustee to complete the

tender of monies heretofore made to you by the bankrupt, enclosed herewith you will find the check of George T. Goggin, as Trustee of the estate of Charles E. Hill, bankrupt, which check is countersigned by Benno M. Brink, Referee, being check No. 5, in the sum of \$5,035.43, being dated June 27, 1946.

This check is tendered in full payment of all monies owing on the Charles E. Hill sales contract covering the real property and improvement thereon as described in said contract dated June 5th, 1945.

The amount is computed in the following manner: Principal and interest, as requested by you, in the sum of \$4,912.63, as demanded by your notice of February 5, 1946, with interest thereon at the rate of 6% per annum to and including the date of tender of same.

The undersigned is the attorney for George T. Goggin, Trustee in said bankruptcy, and makes this tender on behalf of George T. Goggin, Trustee, and on behalf of said estate.

Very truly yours,

/s/ MARTIN GENDEL.

MG:DA

Encl

WUCHNER'S EXHIBIT No. 1

NOTICE

To Charles E. Hill

You are hereby notified that by reason of the default by you in the payment of installments provided for in that certain agreement in writing made and entered into on or about the 5th day of June 1945 by and between yourself and the undersigned, Mrs. Jennie Wuchner, providing for the sale and purchase of that real property in the City of Redondo Beach, County of Los Angeles, State of California, described as follows:

Lots 11, 12 and 13, in Block 173, Redondo Beach, in the City of Redondo Beach, County of Los Angeles, State of California, as per map recorded in Book 39, Page 1, Miscellaneous Records of said County.

Subject to: Covenants, conditions, restrictions, reservations, rights, rights of way and/or easements, if any, of record.

That the undersigned hereby declares said contract forfeited and cancelled.

Dated this 8th day
February, 1946.

MRS. JENNIE WUCHNER.

[Post Office Department Return Receipt No. 3518 for registered article attached.]

HENRY F. POYET,

called as a witness on behalf of the Trustee, and having been first duly sworn by said Referee in Bankruptcy, testified as follows:

Q. (By the Referee): What is your name, for the record?

A. Henry F. Poyet.

Direct Examination

By Mr. Gendel:

Q. Mr. Poyet, you have been connected with the Angelus Escrow Service Company; is that right?

A. That is right.

Q. As President of that Company?

A. Yes.

Q. You are also a practicing attorney at law?

A. That is right.

Q. You were representing Mr. Charles E. Hill, were you, during the month of February, 1946?

A. Yes. I commenced to represent him in January, 1946.

Q. Now, can you tell us approximately when the Trustee's Exhibit No. 2—I think it is—first came to your attention?

Mr. Bearman: What is the Trustee's Exhibit No. 2?

Mr. Gendel: The demand for the payment of the \$4912.63.

Mr. Bearman: I object to that on the grounds that it is incompetent, irrelevant and immaterial.

The Referee: The objection is overruled. It is preliminary.

(Testimony of Henry F. Poyet.)

A. As I recall, it was around the 6th or 7th of February, 1946.

Mr. Bearman: I object to that——

The Witness: A copy of it was sent to me from Mr. Hill in San Quentin, and I believe that this particular notice was served on him as stated in this particular letter.

Mr. Bearman: That latter part should go out; it is hearsay.

The Referee: Yes, that may go out.

Q. (By Mr. Gendel, resuming): It was shortly after the 6th of February that it first came to your notice? A. Yes, that is correct.

Q. What did you do then so far as Mrs. Wuchner was concerned?

A. After receiving this notice—first, I might state that just prior to this notice—(interrupted).

Mr. Gendel: Now, if I miss something, tell me later Mr. Poyet, because I want to keep it in order.

The Witness: All right.

Q. Did you, after receiving this letter, send any communication to Mrs. Wuchner?

A. I did send a copy of it to Mr. Bearman's office in Hollywood.

Mr. Bearman: That is objected to as leading.

The Referee: Let it stand and we will see if he can prove it.

Q. I now show you what purports to be a copy of a letter on the Stationery of the Angelus Escrow Service Company, dated February 11th, 1946, and

(Testimony of Henry F. Poyet.)

ask you if that is in substance a copy of the letter you sent to Mrs. Jennie Wuchner?

A. That is the original letter I sent to Mrs. Jennie Wuchner under date of February 11th, 1946 together with the enclosures and statement of identity.

Mr. Gendel: I want to strike out the word "copy" because I don't want the record confused.

The Referee: Just a moment. How does the witness happen to have the original of the letter now?

The Witness: Well, your Honor, she mailed it back under date of February 14th, 1946, with a letter of her own, returning the letter I sent and the escrow instructions and the statement, all intact.

Q. (By Mr. Gendel): What did you enclose in the letter of February 11th to Mrs. Wuchner?

A. The letter, escrow statement, and escrow instructions signed by Charles E. Hill—that is, signed "Charles E. Hill by Dora M. Hill his Attorney in Fact," and to be signed by Mrs. Jennie Wuchner, providing for the payment of \$4,912.63 for a clear title to Lots 11, 12 and 13, in Block 173 of Redondo Beach, in the City of Redondo Beach, County of Los Angeles, State of California, as per map recorded in Book 39, Page 1, Miscellaneous Records of said County.

Q. Did you likewise accompany that letter with a statement of identity?

A. Yes; the statement of identity was attached.

Q. What was the manner of mailing that letter?

(Testimony of Henry F. Poyet.)

A. Through the regular postal delivery, addressed to 511 North Elena, Redondo Beach, California, to Mrs. Wuchner.

Q. Did you state that you mailed a copy of it to Mr. Bearman, the attorney here?

A. That is my recollection.

Q. What did you mail to him?

A. A copy of the escrow instructions—I might be mistaken, but my recollection is a copy of the escrow instructions and, well, the identical letter was sent to him for his information.

Q. Now, you say that you received these back in the mail? A. I did.

Mr. Gendel: You have seen this, Mr. Bearman, but you might like to see it again.

Mr. Bearman: Yes, and just in passing and without interrupting, does it show where that was mailed and where it was sent?

Q. (By Mr. Gendel): Do you remember in what post office box or mail box the original letter of February 11th and the enclosures with it were deposited?

A. Yes, in the post office in Hermosa Beach, California.

Q. Do you know who did the mailing?

A. Yes, I think it was Mrs. Hill; I think she did.

Mr. Bearman: We object unless he knows of his own knowledge, and what he has just testified would be purely hearsay.

(Testimony of Henry F. Poyet.)

The Witness: They were actually mailed to her.

Mr. Bearman: I move to strike that out, your Honor.

The Referee: Yes, that will go out; but, gentlemen, are we not consuming a lot of time over something that is of no consequence? The witness has stated that he has the letter returning all that.

Mr. Bearman: Yes.

Mr. Gendel: Very well, your Honor.

Q. (By Mr. Gendel): I show you a letter dated February 14th, 1946, directed to "H. F. Poyet, Attorney at Law, 114 Pier Avenue, Hermosa Beach, California," signed "Mrs. Jennie Wuchner" in ink and typewriting, that is, in longhand and typewriting; how and when was that received by you?

A. That was received by me through the United States mail on or about February 14th, 1946, in an envelope, and it enclosed this letter signed by Mrs. Jennie Wuchner and also returned the letter dated February 11th, 1946, signed by myself as President of the Angelus Escrow Service Company to Mrs. Jennie Wuchner, and also returned the original escrow instructions in Escrow No. 32 unsigned by her, as well as the statement of identity.

Mr. Gendel: I would like to introduce this letter and these documents as one exhibit, as our next exhibit in order, or rather the Trustee's exhibit next in order.

(Testimony of Henry F. Poyet.)

TRUSTEE'S EXHIBIT No. 4

Redondo Beach, California

February 14, 1946

Mr. H. F. Poyet
Attorney at Law
114 Pier Avenue
Hermosa Beach, California

I am returning herewith Escrow Instructions No. 32, in the same condition in which they were received.

Non-compliance with the terms of the contract entered into by Jennie Wuchner and C. E. Hill, covering sale and purchase of property described in the contract, has caused same to be forfeited and cancelled.

Yours very truly,

/s/ MRS. JENNIE WUCHNER

[Letterhead—Angelus Escrow Service Company]

In Reply Refer to Escrow No. 32.

Escrow Officer: H. F. Poyet.

February 11, 1946.

Mrs. Jennie Wuchner
511 North Elena
Redondo Beach, California

Dear Mrs. Wuchner.

In accordance with our previous letter to you and in accordance with your demand of February 5, 1946 directed to Mr. Charles E. Hill referring to the purchase agreement between yourself and

(Testimony of Henry F. Poyet.)

Trustee's Exhibit No. 4—(Continued)

Charles E. Hill covering the property at 732 North Pacific avenue in Redondo Beach, more particularly described in the agreement of June 5th, 1945 to which reference is hereby made, we have prepared the instructions for your signature and ask that if you will execute them, and return to us we shall be pleased to order the policy of title Insurance from such company as you prefer of if you have no preference we shall order it from the Title Insurance and Trust Company of Los Angeles, forwarding you a copy of the preliminary report.

This is to advise you that there is on deposit at this time the full amount of your demand of \$4912.63 subject to the escrow instructions for clear title as therein set forth.

Awaiting your instructions and pleasure,

Very truly yours

/s/ H. F. POYET

Henry F. Poyet. President

ESCROW INSTRUCTIONS—BUYER

Escrow No. 32. H. F. Poyet, Escrow Officer
Angelus Escrow Service Corporation as Escrow
Holder:

February 11, 1946

Gentlemen:

In Consideration of your acting as escrow holder herein, it is agreed that:

1. Negotiable or non-negotiable instruments received by you may be transmitted for collection, to

(Testimony of Henry F. Poyet.)

Trustee's Exhibit No. 4—(Continued)

drawee or other obligee if it be a Bank or through collecting agents in the usual course of business, and you shall not be held liable for default of any drawee, obligor, or collecting agent, for loss in transit, or otherwise, until proceeds in actual cash come into your possession.

2. You shall not be liable for the failure of any condition of this escrow, or damage caused or omissions done in good faith, or for any claim or loss claimed or suffered by any party hereto, by the exercise of your discretion in any particular manner, or any other reason except deliberate wilful neglect or gross misconduct; and you will not be held responsible for forgeries, or false personations in connection with these instructions, instruments of record, or those handed into escrow; nor for any failure to comply with any provision of any agreement or other document filed in or referred to in this escrow.

3. You are not bound to recognize any notice, demand, or change of instructions, as having any effect in this escrow unless given in writing by all parties considered by you to be affected thereby.

4. It is further agreed that if any controversy arises, or if conflicting demands be made, between or by the parties hereto or any third person, you shall have the absolute right either to withhold and suspend all further proceedings in performance of the escrow and wait a settlement of the controversy, or file a suit of interpleader and obtain an order of

(Testimony of Henry F. Poyet.)

Trustee's Exhibit No. 4—(Continued)

Court requiring the parties to interplead and litigate their claims and rights among themselves; and the parties hereto jointly and severally promise to pay on demand, as well as indemnify and hold you harmless, as escrow holder, from any damages, attorney's fees or other expenses, obligations, or liabilities made in good faith or arising out of the above or any other procedure in escrow.

5. You are given a lien on all rights, titles, and interests of each of the parties hereto in his escrow papers, and other property, and moneys arising therefrom, to protect yourself, to indemnify yourself, and to reimburse yourself, for all costs, expenses, and liabilities caused by such party.

Paid outside.....	\$
Cash in escrow.....	\$4912.63
Encumbrances of record assumed..	\$
New encumbrance.....	\$
Total consideration.....	\$4912.63

I will also execute and deliver to you before the time limit hereinafter named, any instruments, including notes secured by encumbrances I create, and additional funds required from me to enable you to comply with these instructions, all of which you are authorized and instructed to use provided instruments have been filed for record entitling you to procure assurance of title in the form of a policy of Title Insurance issued by Title Insurance and Trust Company Title Guarantee and Trust Company;

(Testimony of Henry F. Poyet.)

Trustee's Exhibit No. 4—(Continued)

National Title Insurance Company or Security Title Insurance and Trust Company in the issuing company's usual form, with liability of such title company limited to not less than \$4912.63 (if a Continuation Guarantee or Certificate is procured, the above liability shall apply to it only, on the following described property in the City of Redondo Beach, County of Los Angeles, State of California, viz:

Lots 11, 12, and 13, in Block 173, of Redondo Beach, in the City of Redondo Beach, County of Los Angeles, State of California as per map recorded in Book 39 page 1 miscellaneous records of said county.

as per map recorded in Book 39 Page 1 of M R records in said county showing: Title vested in Charles E. Hill.

Free of encumbrances except taxes for the fiscal year 1945-1946 taxes, and personal property taxes, if any, of any former owner, if same are a lien against this property, and any and all taxes levied or assessed subsequent to date of these instructions;

Assessments and/or bonds, as follows: none.

Conditions, restrictions, reservations, rights, rights-of-way and easements, now of record, if any; None.

If said assurance of title does not cover municipal liens in the city named, obtain a municipal lien report dated during this escrow from any agency customarily employed by you, showing said property clear of such liens, not expected above. Should

(Testimony of Henry F. Poyet.)

Trustee's Exhibit No. 4—(Continued)

said Municipal Lien Report disclose any liens not excepted above, it will be satisfactory if said liens are paid through this escrow and without cost to me.

The following adjustments only are required in this escrow.

I agree to pay on demand, regardless of the consummation of this escrow all charges incurred by you on my behalf including the title company's new owner fee and fee for showing the lien of any encumbrance I create, if such charges are made, in addition to the fee for recording deed, escrow fee.

Time is declared to be the essence of these instructions and in the event that the terms and conditions of this escrow have not been complied with on or before the first day of May 1946, at the hour of 5:00 p.m., you are authorized and instructed to complete this escrow as soon as practicable thereafter,

Provided, however, that at any time after said day and hour, I have fulfilled my obligations under this escrow while there exists any default of the obligations of seller herein, I may demand the return of the documents and/or moneys deposited by me in this escrow, and upon being reimbursed for all of your charges and expenses in connection herewith, you are to comply with such demand and terminate the escrow, and

Provided, also, that at any time after said day and hour, should seller have fulfilled their obligations under this escrow while there exists any default of my obligations herein, I may demand the return of

(Testimony of Henry F. Poyet.)

Trustee's Exhibit No. 4—(Continued)

the documents and/or moneys deposited by them in this escrow, and, upon being reimbursed for all of your charges and expenses in connection herewith, you are to comply with such demand and terminate the escrow.

No commission is payable out of this escrow other than as hereinabove set forth.

Each of the undersigned states he has read the foregoing instructions and understands and agrees to them.

CHARLES E. HILL

By /s/ DORA M. HILL

His attorney in Fact.

Address: 621 No. Iuna Ave. Redondo Beach Calif.
Phone: 3846.

SELLER

Hermosa Beach, Calif.,

February 11, 1946.

The foregoing instructions, terms and conditions are hereby approved and accepted in their entirety and concurred in by me, I will supply you with a deed executed by Jennie Wuchner, a widow of the property described together with/or other insurance demanded, if any, and which you are authorized to deliver, provided that within the time limit or close of escrow specified you hold for the account of Jennie Wuchner the sum of \$4912.63 together with any additional moneys and all instruments deliverable to me under these instructions.

(Testimony of Henry F. Poyet.)

Trustee's Exhibit No. 4—(Continued)

Instruct the Title Company to begin search of title at once and I will pay their charges on demand. I also will pay on demand all costs and charges (except those which the buyer has agreed to pay) as follows: Charges for assurance of title, escrow fee,

Affix and cancel Internal Revenue Stamps on my deed in the amount of \$ _____, I agree to pay for same.

Issue your check for balance in favor of Jennie Wuchner and credit—mail to 511 North Elena, Redondo Beach, California.

Time is declared to be the essence of these instructions and in the event that the terms and conditions of this escrow have not been complied with on or before the first day of May, 1946, at the hour of 5:00 p.m., you are authorized and instructed to complete this escrow as soon as practicable thereafter,

Provided, However, that at any time after said day and hour, should I have fulfilled my obligations under this escrow while there exists any default of the obligations of buyers herein, I may demand the return of the documents and/or moneys deposited by me in this escrow, and upon being reimbursed for all of your charges and expenses in connection herewith, you are to comply with such demand and terminate the escrow, and

Provided also, that at any time after said day and hour, should buyers have fulfilled their obligations under this escrow while there exists any

(Testimony of Henry F. Poyet.)

Trustee's Exhibit No. 4—(Continued)

default of my obligation herein, I may demand the return of the documents and/or moneys deposited by them in this escrow and upon being reimbursed for all charges and expenses in connection herewith, you are to comply with such demand and terminate the escrow.

No commission is payable out of this escrow other than as hereinabove set forth.

Each of the undersigned states he has read the foregoing instructions and understands and agrees to them.

Address:

Phone:

CONFIDENTIAL

information for use by the Title Company in searching the records in connection with its

ORDER NO. _____

15

**MY
FULL NAME**

(FIRST NAME) _____ (FULL MIDDLE NAME - IF NONE, INDICATE) _____ (LAST NAME) _____
 Birthplace _____ Year of Birth _____ Race _____
 I have lived continuously in the U. S. A. since _____
 (If married, complete the following:)
 Full name of { wife _____
 { husband _____ (FIRST NAME) _____ (FULL MIDDLE NAME - IF NONE, INDICATE) _____ (LAST NAME) _____
 Birthplace _____ Year of Birth _____ Race _____
 SHE _____
 HE _____ has lived continuously in the U. S. A. since _____
 We were married on _____ (DATE) _____ at _____ (PLACE) _____
 Wife's maiden name _____

**RESIDENCES
AND
OCCUPATIONS
DURING
PAST 5 YEARS**

RESIDENCES

NUMBER AND STREET	CITY	FROM (DATE)	TO (DATE)

OCCUPATIONS

(Husband's) _____
 FIRM NAME _____ LOCATION _____
 FIRM NAME _____ LOCATION _____
 (Wife's) _____
 FIRM NAME _____ LOCATION _____
 FIRM NAME _____ LOCATION _____
 FIRM NAME _____ LOCATION _____
 (If more space needed, use reverse side of form)

**ANY
FORMER
MARRIAGE
OR
MARRIAGES**

(If no former marriage or marriages, write "None" _____ Otherwise, please complete the following:)
 Name of former wife _____
 Deceased _____ Divorced _____ When _____ Where _____
 Name of former husband _____
 Deceased _____ Divorced _____ When _____ Where _____
 (If more space needed, use reverse side of form)

THE STREET ADDRESS of the property in this transaction is: _____

(Leave Blank if None)

DRIVE
AVENUE
STREET

Date _____

SIGNATURE _____

(If married, both husband and wife should sign)

SIGNATURE _____

BUSINESS PHONE _____ HOME PHONE _____

The filling out of this form will help protect you and will speed the completion of your order.
 Should you want to know why, an explanation will be found on the other side.

(Testimony of Henry F. Poyet.)

Trustee's Exhibit No. 4—(Continued)

THERE REALLY IS A REASON

We don't like to ask you to fill out this statement of indemnity. We don't want you to think we are unnecessarily interested in your personal affairs. We are not. We have been asked to insure a title to real property in which you are interested, and if you will give us the information called for, it will help us do our job quickly and well.

The population of the Los Angeles area has been estimated at more than three and a half million people. Please think for a moment how many have the same or similar names. In searching your title we will inevitably encounter judgments, bankruptcies, divorces, income-tax liens—and yes—insanity commitments, against persons with names similar to yours. Such matters cloud the title to your property unless eliminated by information showing you are not the person involved in these difficulties. You see, then, that we need to know something about you—and, on account of California's community property laws, something about your wife too, if you are married—so that we may promptly ignore all matters not directly affecting you or the property being searched.

All we are trying to say is that by filling out this form in full, you are helping us give you the kind of service you would like to have.

YOUR TITLE INSURANCE COMPANY

(Testimony of Henry F. Poyet.)

Mr. Bearman: We object to that on the grounds that it is immaterial—or, let me state it this way: on the grounds that it is too remote, and immaterial, and no foundation laid.

The Referee: What foundation has not been laid?

Mr. Bearman: I don't know that he was authorized to represent the Hills at that time.

The Referee: That may be incompetent, I don't know and we can't tell as to that at this time, but certainly the foundation has been laid for the introduction of the documents. The objections are overruled. Trustee's Exhibit No. 4. Proceed.

Q. (By Mr. Gendel): Mr. Poyet, in connection with the statements contained in your letter of February 11th, 1946, tendering the \$4,912.63, did you at that time have that money in the Angelus Escrow Service Company? A. We did.

Q. And the sole condition in connection with the payment of that money was obtaining a certificate of title insurance; is that right?

A. That is right.

Q. And that was pursuant to the terms of the Agreement for Sale of Real Estate, the Trustee's Exhibit No. 1 here; is that correct?

A. Yes, that is correct.

Mr. Gendel: That is all, for Mr. Poyet, at this time.

The Referee: Have you any questions, Mr. Bearman?

Mr. Bearman: Yes, your Honor.

(Testimony of Henry F. Poyet.)

Cross-Examination

By Mr. Bearman:

Q. Mr. Poyet, I think you stated very plainly that you didn't remember sending me a copy of the escrow instructions; is that correct?

A. I sent you copies of everything else, and it is my recollection that I sent you copies of those, too. I might be mistaken in that; but I did discuss it with you, that I do know, Mr. Bearman.

Mr. Bearman: May I see those escrow instructions, your Honor, please?

The Referee: Yes.

Q. (By Mr. Bearman): You say you discussed the escrow instructions with me, Mr. Poyet?

A. Yes, Mr. Bearman.

Q. And when was the first discussion you had with me and how and where did it take place?

A. Well, my first discussion with you was—
(Interrupted.)

Mr. Bearman: I will withdraw that question at this time. I don't think it is important.

Q. Now, this Escrow No. 32, which refers to, or rather it says: "Escrow Instructions Buyer Angelus Escrow Service Corporation" dated "February 11, 1946." That instruction, or this instruction which has been offered here by the Trustee, in evidence as a part of Trustee's Exhibit No. 4 is signed: "Charles E. Hill By Dora M. Hill His Attorney In Fact" and it says: "Cash in escrow \$4912.63"—and I am reading from the body of the Escrow Instructions. Now, I will ask you, Mr. Poyet,

(Testimony of Henry F. Poyet.)

whether or not there was an escrow which this refers to in which Mr. Charles E. Hill had, absolutely, \$4912.63 of his own funds or his own money in that escrow?

Mr. Gendel: Just a moment. I object to that question, as to whether he had his own funds or his own money there as being incompetent, irrelevant and immaterial. Mrs. Wuchner is not concerned with whose money it is so long as it is being paid to her.

The Referee: Well, yes, the question is proper; it is a proper question. Counsel desires to ascertain whether or not the sum of money in question was under the control and disposition of Charles E. Hill.

Mr. Bearman: That is exactly right, your Honor.

The Referee: Where he got the money from is immaterial; but if the money was in the escrow subject to the order of Mr. Hill it would be his money, whether he owed it to anybody else or not. The objection is overruled.

Mr. Glendel: I have no objection to the witness answering that question.

The Witness: I will answer that question this way: Mrs. Hill took \$4912.63 in cash with Frank Bruno and Teddy Berg and took it to Mrs. Wuchner—(interrupted).

Mr. Bearman: Just a moment.

Mr. Gendel: Just a moment.

The Referee: The witness will answer the question, the question being: Was there in this particular escrow at the time in question the sum

(Testimony of Henry F. Poyet.)

mentioned, \$4912.63, to the credit of Charles E. Hill and subject to his order and disposition?

Mr. Bearman: That is right; that is correct.

The Referee: Now, let the witness answer.

The Witness: We did not have it in this particular escrow, no.

The Referee: That is all on that, then.

Mr. Bearman: Yes. That is all.

The Referee: Go ahead.

Mr. Bearman: We have no more questions.

The Referee: Have you any further questions, Mr. Gendel?

Mr. Gendel: Yes, your Honor.

The Referee: You may proceed.

Redirect Examination

By Mr. Gendel:

Q. Mr. Poyet, under what circumstances was the \$4912.63 available.

Mr. Bearman: Objected to as incompetent, irrelevant and calling for a conclusion of the witness. Not material.

The Referee: The objection is overruled. (Pause.) Go ahead and answer the question, Mr. Poyet.

A. This property was sold to a Mr.—(pausing).

Q. (By Mr. Gendel): Let me ask you a little differently, so as not to get too far afield: In what manner were you going to pay the \$4912.63 if the escrow instructions as recorded were signed and returned pursuant to your demand?

Mr. Bearman: Objected to as incompetent, ir-

(Testimony of Henry F. Poyet.)

relevant and immaterial. The escrow instructions have been introduced here, and testimony introduced that there was so much money on deposit that belonged to the Hills or that they had dominion over.

The Referee: No, they can go a step farther. You have ascertained that at the time in question there was no money in this particular escrow over which Mr. Hill had control.

Mr. Bearman: Yes, that is right.

The Referee: And if they can show that there was some other escrow from which Mr. Hill was then entitled to receive money and in which he had given instructions that the money be paid into this escrow that would be proper.

Mr. Bearman: I see what you mean, but I think Mr. Gendel's question is asking for something the witness has in mind. It is not proper as to form.

The Referee: I think the question might be improved upon as to form, but we all know what he is asking about.

Mr. Bearman: Will you read the question, Mr. Reporter?

(The Reporter read the last question by Mr. Gendel.)

Mr. Gendel: I will withdraw the question.

The Referee: Well, let me ask him: Mr. Poyet, do you know of any transaction at or about the time with which we are here concerned in which Mr. Hill was entitled to receive money?

Mr. Bearman: I object to the question propounded by the Court, on the grounds that I think

(Testimony of Henry F. Poyet.)

it is incompetent, irrelevant and immaterial. In other words, he might have something in mind whereby he was going to obtain money, but the question is whether he had in that escrow certain money and that money was on deposit at a particular place for this purpose.

The Referee: Perhaps it is not legally sufficient, but our desire here is to get all the facts in pertaining to the matter. The Court will withdraw the question to which Mr. Bearman's objection is made, and will simply ask this question, with permission of counsel, or consent of counsel:

Q. Mr. Poyet, to your knowledge was there any escrow other than the one already mentioned pending at about the time with which we are concerned here in which Charles E. Hill was in any way a party? Now, you must answer that question "Yes" or "No". A. Yes.

The Referee: All right, counsel, do you want to proceed from there?

Mr. Gendel: Yes, your Honor.

Q. (By Mr. Gendel): Did this pending escrow the Court has referred to in his question have anything to do with the escrow as described in Trustee's Exhibit No. 4?

Mr. Bearman: That is objected to, if your Honor please, on two grounds; first: upon the ground that it is purely hearsay, and not the best evidence. If there are any such instructions they are the best evidence.

(Testimony of Henry F. Poyet.)

The Referee: Yes, that objection is good, Mr. Gendel. The witness has been permitted to state whether or not there was an escrow in which Mr. Hill had an interest, he having said "Yes" that there was, and now it is incumbent upon you to show by the original papers what that escrow was and what Mr. Hill's connection with it was.

Mr. Gendel: I don't want to encumber the record with a great deal of shadow boxing, but I would like to point out to the Court that in the Answer by Jennie Wuchner to the Complaint filed by Charles E. Hill and Dora M. Hill in the Superior Court of the State of California, in and for the County of Los Angeles, on page 10 in paragraph 11, Mrs. Wuchner admits receiving these "Escrow Instructions No. 32" but which Mr. Bearman stated he never saw before, and admits returning them, as shown here in the letter of February 14th, Trustee's Exhibit No. 4, and that is the question we are concerned with where there has been a tender, and Mr. Hill didn't need to have \$4912.63 or four cents in the bank if that is the situation.

The Referee: You are the one going forward with the examination of this witness, Mr. Gendel, and if you do not feel that it is a proper question you may abandon it.

Mr. Gendel: Well, Mr. Poyet, the witness, was handling these escrows, and he knows whether he had these dealings and whether this money was on deposit, but did he have under his control as the head of this escrow company—the Angeles Escrow

(Testimony of Henry F. Poyet.)

Service Company—the \$4912.63? However, I don't think we are concerned with the ancillary escrows by which that money would be available, because Mrs. Wuchner refused the tender.

Mr. Bearman: I move to strike that statement out.

The Referee: Yes; that is not evidence; that is a statement by counsel. Now, we are not deciding the legal question, but ruling on the evidence. Proceed.

Q. (By Mr. Gendel): Do you have with you the copy of the escrow instructions?

A. I do, but I will have to look for them in my file.

The Referee: We will take a short recess.

(Immediately following the ten-minute recess the hearing was resumed:)

Q. (By Mr. Gendel): Now, Mr. Poyet, you have gone through some of your various escrow papers, have you? A. Yes, I have.

Mr. Bearman: Without trying to be facetious, is he now testifying as President of the Escrow Service Company, or as an attorney?

Mr. Gendel: He is testifying to matters within his own knowledge, Mr. Bearman.

The Referee: All right; proceed; gentlemen.

Q. (By Mr. Gendel): Now, Mr. Poyet, you have shown to counsel for both sides a memorandum on the heading of the Angelus Escrow Service Company, dated February 11th, 1946. A. Yes.

(Testimony of Henry F. Poyet.)

Q. Is that the money referred to heretofore by you as being available for the payment of the tender?

Mr. Bearman: Before answering that question, Mr. Poyet, I interpose the objection that it is incompetent, irrelevant and immaterial, and is calling for the conclusion of this witness, your Honor.

The Referee: Overruled. Answer the question.

A. Yes.

Q. (By Mr. Gendel): Tell us what this document of February 11th, 1946, is.

Mr. Bearman: I object to the question on the ground that the document speaks for itself.

The Referee: Objection sustained.

Q. Does that document bear the signatures of Frank Bruno and Teddy Berg? A. It does.

Q. Was it signed by them in your presence?

A. It was.

Q. Was it signed on February 11th, 1946?

Mr. Bearman: We object. The document speaks for itself.

The Referee: The objection is overruled.

A. Yes, it was signed on that date.

Q. Do you recognize the signature on here: "Charles E. Hill by Dora M. Hill, His Attorney in Fact" as being the signature of Mrs. Hill?

A. I do.

Q. Was that, likewise, signed February 11th, 1946? A. It was.

Mr. Gendel: I now ask that this document re-

(Testimony of Henry F. Poyet.)

ferred to and dated February 11, 1946, be introduced as the Trustee's next exhibit in order.

Mr. Bearman: I object to it on two grounds; first, that it is incompetent, irrelevant and immaterial; and that no foundation has been laid to show that she had any authority to sign for Charles E. Hill.

Mr. Gendel: That doesn't make any difference, anyway, counsel.

Mr. Bearman: I don't see why not.

Mr. Gendel: I am not questioning the authenticity of the power-of-attorney here. The wife, Dora M. Hill, was acting for the husband, who was confined in San Quentin. I don't think that is a question here.

Mr. Bearman: But you are introducing a certain document signed not by that person Charles E. Hill, but by someone who purports to have a certain agency.

Mr. Gendel: That is a matter for cross-examination.

Mr. Bearman: No, it is not, and my objection is that no proper foundation has been laid.

Mr. Gendel: And that is not the score; the question was whether that is her signature and signed by her on that date, and his answer to that question was "Yes."

Mr. Bearman: I will interpose my objection.

The Referee: The objection is overruled, and the instrument is received in evidence as Trustee's Exhibit No. 5.

(Testimony of Henry F. Poyet.)

Its legal effect is a matter for the Court to determine.

TRUSTEE'S EXHIBIT No. 5

[Letterhead Angelus Escrow Service Company]

In Reply Refer to Escrow No. 32.

Escrow Officer: H. F. Poyet.

February 11, 1946.

Angelus Escrow Service Corporation.

Referring to the escrow instructions of Charles E. Hill in the above numbered escrow which instructions are made a part of this instruction by reference, we the undersigned hand you the sum of \$4912.63 which you are to use when you can comply with the foregoing instructions of Charles E. Hill purchasing the property therein described free of liens or encumbrances as therein set forth and in addition thereto you will record for us concurrently with the deed from Mrs. Jennie Wuchner to Charles E. Hill a deed from Charles E. Hill and Dora Hill his wife to Frank Bruno and Teddy Berg to the above described property you will have the title showing free and clear of encumbrances said property in Frank Bruno and Teddy Berg.

We are also handing you herewith \$202.45 with you are authorized to pay to the County Tax Collector of Los Angeles County on account of the Tax sale of the machinery of Charles E. Hill at 732 Pacific Avenue, Redono Beach, California. You are authorized to pay this money out of funds deposited

(Testimony of Henry F. Poyet.)

with you regardless of the condition of title and without any liability to you.

/s/ FRANK BRUNO,

/s/ TEDDY BERG.

I, Charles E. Hill, agree to execute the deed in accordance with the foregoing instruction and agree to comply therewith.

CHARLES E. HILL,

By /s/ DORA M. HILL,

His Attorney in Fact.

Q. (By Mr. Gendel): Did Mrs. Hill have a written power-of-attorney affecting this property permitting her to sign on behalf of Mr. Hill?

Mr. Bearman: Of his own knowledge? We object to that.

The Referee: You are asking about the contents of a written instrument.

Mr. Gendel: I have to find out about its contents before I can introduce it.

The Referee: Objection sustained.

Q. Have you in your possession the executed power-of-attorney, Mr. Poyet?

A. I believe we have.

Q. Will you produce it, please?

A. Yes. Mrs. Hill will be here in a moment and she can find it.

Mr. Gendel: All right, then; that is all at this time, Mr. Poyet.

(Testimony of Henry F. Poyet.)

The Referee: Have you any questions, Mr. Bearman?

Mr. Bearman: Now, Mr. Gendel, will you object to all these questions I am going to ask him?

Mr. Gendel: Which ones, Mr. Bearman?

Mr. Bearman: No questions.

The Referee: Stand aside, Mr. Poyet.

Mr. Gendel: I want to ask Mrs. Hill: Do you have here your power-of-attorney to sign for your husband, Mr. Charles E. Hill?

Mrs. Hill: Yes.

Mr. Gendel: Will you please find it for us?

Mrs. Hills: Yes.

Mr. Gendel: By the way, Mr. Bearman, will it be necessary to produce Mrs. Hill to testify that she mailed the letter of February 11th, 1946, and that it had in it the escrow instructions and the statement of identity, the one you——(interrupted).

Mr. Bearman: What did you say?

Mr. Gendel: Will it be necessary to have Mrs. Hill testify that she did mail the envelope to Mrs. Wuchner containing the letter of February 11th, the escrow instructions and the statement of identity?

Mr. Bearman: No, we stipulate to that.

(At this juncture Mr. Gendel exhibited a paper to Mr. Bearman.)

Mr. Bearman: Is that from the Escrow Department, or is it from the Legal Department?

Mr. Gendel: This is from her private, personal papers.

Mr. Bearman: I was trying to differentiate as between the two, that is, whether Mr. Poyet is the Escrow Officer or the Legal Department here.

Mr. Gendel: Mrs. Hill, will you take the witness stand and be sworn, please?

DORA M. HILL

called as a witness on behalf of the Trustee, and having been first duly sworn by said Referee in Bankruptcy, testified as follows:

The Referee: Your name, please?

The Witness: Mrs. Dora M. Hill.

Mr. Bearman: Just to save time, I think it might be stipulated that there has been shown to me an instrument designated: "Power-of-Attorney From Charles E. Hill of Rendono Beach, California," in which he appoints "Dora M. Hill, My Wife" of the same place "My Attorney for Me and in My Name and For My Use and Benefit," and it is dated the 6th day of November, 1945, there being the signature on here "Charles E. Hill" and if Mr. Gendel states that is the signature of Mr. Hill I will so stipulate; and on the reverse side of this instrument they have—the instrument I have just referred to, there appears a jurat designated: "State of California, County of Los Angeles," in which it states: "Personally appeared Charles E. Hill before Belle H. Wingers, Notary Public," and I will stipulate that that is the power-of-attorney in question, but with this further provision, that is, that the power-of-attorney which I have referred to

(Testimony of Dora M. Hill.)

doesn't bear anywhere upon any part of the instrument any indicia showing that the instrument is recorded.

Mr. Gendel: I think, to complete the record here, we will introduce the power-of-attorney, with the stipulation that we may substitute a copy, because I think this is the only executed copy.

The Referee: Why is it necessary to take this instrument away from this lady, counsel having stipulated to it?

Mr. Bearman: And I have described it very fully, so that there should be no question about it.

Mr. Gendel: Very well.

Mr. Bearman: And if necessary I will substitute a copy of it.

The Referee: You have stated, Mr. Bearman, that it is a full power-of-attorney.

Mr. Glendel: Yes.

Mr. Bearman: Yes, your Honor.

The Referee: And that is sufficient as to that. Is that all for this witness?

Mr. Gendel: Yes.

Mr. Bearman: I have no questions.

Mr. Fowler: Mr. Heffren, will you take the stand and be sworn, please.

M. J. HEFFREN

a witness called on behalf of the Respondent Jennie Wuchner, and said witness having been first duly sworn by said Referee in Bankruptcy, testified as follows:

The Referee: What is your name?

The Witness: M. J. Heffren.

Direct Examination

By Mr. Fowler:

Q. Mr. Heffren, where do you reside?

A. In Venice, California.

Q. Do you know Mrs. Jennie Wuchner?

A. I do.

Mr. Fowler: May I see the notice dated February 5th, your Honor? It was introduced as an exhibit here.

The Referee: Yes.

Q. (By Mr. Fowler): I show you a notice dated the 5th day of February, 1946, signed: "Mrs. Jennie Wuchner" and ask you if you have ever seen that notice before? A. Yes; I saw her sign it.

Q. And did you do anything with that notice after you saw Mrs. Wuchner sign it?

A. Yes; I took it to the postoffice and mailed it to Charles E. Hill.

The Referee: Gentlemen, isn't it admitted the notice was received in due course.

Mr. Fowler: This is in reference to Mrs. Hill.

The Referee: Isn't it also stipulated that Mrs. Hill received the notice?

(Testimony of M. J. Heffren.)

Mr. Gendel: Yes, the only thing is as to the date on which she received it.

The Referee: Can't you stipulate on that now? She is present.

Mr. Gendel: But she doesn't know the date she received it. She doesn't remember the date.

The Referee: Then, what date did you put this notice in the postoffice?

A. I put it in the postoffice on the 5th day of February, 1946.

Q. (By Mr. Fowler): Did you ever deliver personally a copy of that notice to Mrs. Hill?

A. I did.

Q. On what date?

A. On February 6th, 1946 at about one o'clock.

Mr. Fowler: That is all.

The Referee: Have you any cross-examination of this witness?

Mr. Gendel: None.

Mr. Fowler: That notice of February 8th was mailed from our office, and Mrs. Bearman mailed it, if they want to so stipulate.

Mr. Gendel: Do you mean that a copy of it was mailed to Mrs. Hill as well as to Mr. Hill?

Mr. Bearman: Yes.

Mr. Gendel: If you stipulate that is correct, then I so stipulate.

Mr. Bearman: That is right.

Mr. Fowler: Yes, that is correct.

Mr. Glendel: Then I so stipulate.

The Referee: Anything else, gentlemen?

(Testimony of M. J. Heffren.)

Mr. Bearman: Well, your Honor please, I think we have covered everything by way of the stipulations and by way of the testimony that has been introduced, I think we have covered everything by way of facts. Of course, there are the legal questions that may be raised. However, we rest at this time.

The Referee: There is one item that has not been covered in the evidence, and that is the condition of this contract at the time of the demand for payment in full, except it has been stipulated that the contract is in default; but I don't think that is sufficient.

Mr. Bearman: I thank you, your Honor, and I will state at this time that I understand there was a stipulation entered into, and I think I made the statement stating that if you computed it in that fashion I think that is correct; and Mr. Gendel stated that there is \$4912.63—(interrupted).

Mr. Gendel: No, the question by the Court now is just what defaults there were at that time, and I think I made the statement there were two defaults at that time, in the payments.

The Referee: I think that is in the record, but the course of dealing between them should be in the record here. I see that there is attached to Trustee's Exhibit No. 1 here a list of payments that were made, which, of course, is a part of the record; but whether it is complete or not the Court doesn't know, and I shall read it (reading): under the caption "Date Paid" appears the figures "7-1-45" and in the same line with those figures and under the

(Testimony of M. J. Heffren.)

caption "Balance of Prin. Unpaid" there appears the sum of "\$5500.00" and under the caption "Date Paid" appears the figures "7-2-1945"; under the caption "Amount Paid" in the same line is "\$350.00"; under the caption "Credit on Principal" in that same line "\$350.00"; and under the caption "Balance of Principal Unpaid" in the same line we find the figures "\$5150.00"; and the next and last entry on this statement of payments is the following: "7-1-45" under "Date Paid" and under the caption "Date Due" appear the figures "8-1-45" and under the caption "Amount Paid" in this line is "\$200.00" and under the caption "Credit on Interest" we find the figures "25.75" and under the caption "Credit on Principal" the figures "\$174.25"; under the caption "Balance of Principal Unpaid" are the figures "\$4975.75" and there the record ends.

Mr. Gendel: Apparently there was one other payment made and they released it.

The Referee: Can you stipulate as to when that payment was made, and how it was credited?

Mr. Fowler: There was also another payment made under date of September 1st, 1945—I will read from this memorandum which shows: "Date paid, 9-1-45; Date due, 9-1-45; Amount paid, \$200.00; interest, \$24.88, principal, \$175.25; balance principal, \$4800.63," and we so stipulate. Now, will you stipulate, Mr. Gendel, that was the last payment made on this contract?

(Testimony of M. J. Heffren.)

Mr. Gendel: We so stipulate, and the memorandum you have read would probably end our problem up to September 1st, 1945, because it shows: "Date due, 9-1-45" and "Date paid, 9-1-45."

The Referee: The contract provides for the payment of \$5500.00, and the contract is dated the 5th day of June, 1945.

Mr. Fowler: That is correct.

The Referee: The contract provides for the following payments: "\$350.00 upon the execution and delivery of this Agreement, receipt of which is hereby acknowledged, and the further sum of Two Hundred Dollars (\$200.00) or more on or before the first day of each calendar month thereafter until the sum of Fifteen Hundred Dollars (\$1500.00) shall have been paid on the principal sum, together with interest thereon at the rate of 6% per annum. Each payment shall be credited first on interest then due and the remainder on principal; and interest shall thereupon cease upon the principal so credited. Should default be made in payment of any installment when due the whole sum of principal and interest shall become immediately due at the option of the Seller. If action be instituted on this contract, Buyer to pay such sum as the Court may fix as attorney's fees whether such action progress to judgment or not." Now, it may or may not be important to determine whether or not the Seller has waived the proposition that time was of the essence of the contract. As I say, the contract appears to be dated June 5th, 1945, and it

(Testimony of M. J. Heffren.)

calls for the immediate payment of \$350.00, and yet the record we have here shows that payment of the \$350.00 was made on July 2nd, 1945, and the contract provides for a payment on the 1st day of July of \$200.00 which appears not to have been made—wait a minute—yes, there was a \$200.00 payment on July 1st but it was credited, apparently, on the payment due August 1st, 1945. Then the only other payment was made September 1st for the September 1st installment. Query: What became of the \$200.00 that was due July 1st, and was or was not any payment made on August 1st. Now, also, gentlemen, from our general experience we know that sometimes the holder of a contract in making entries or record of payments puts down as the date of payment the due date, when, as a matter of fact, the payment was received five, ten, fifteen or twenty days after that date, and it may or may not be important to get all of these exact facts into the record, because it may be necessary to determine whether this Seller has waived the proposition that time is of the essence of the contract.

Mr. Gendel: I have made inquiry of Mrs. Hill as to what took place, and if necessary I will put her on the witness stand—and I will make the preliminary statement, which is not testimony, but she states that—(interrupted).

Mr. Bearman: Just a moment.

The Referee: I am not going to insist that anybody put in any further testimony or any further evidence, but unquestionably, Mr. Gendel, you are

confronted with the question that time is of the essence of the contract.

Mr. Gendel: Well, I will have Mrs. Hill take the witness stand on behalf of the Trustee.

DORA M. HILL

a witness on behalf of the Trustee, and having been duly sworn by said Referee in Bankruptcy, testified further as follows:

Direct Examination

The Referee: You have been sworn, Mrs. Hill.
By Mr. Gendel:

Q. I will first ask you, do you have any personal knowledge of just when these various payments that have been credited against the contract here were made?

Mr. Bearman: I object to the question unless she knows of her own personal knowledge.

The Referee: Objection overruled. The question calls for a "Yes" or "No" answer. Do you have such knowledge?

Mr. Bearman: I withdraw my objection.

A. No, I can't state definitely when it was.

Q. After September 1st, 1945, did you have any conversations with the Seller concerning the payments required by the sales contract?

Mr. Bearman: I object, unless it is preliminary, and unless you fix the time.

Mr. Gendel: It is preliminary.

The Referee: Tell us whether or not you had any conversation with Mrs. Jennie Wuchner?

(Testimony of Dora M. Hill.)

A. No, not with her, but with her son.

The Referee: What is his name?

A. Norman Wuchner.

Q. (By Mr. Gendel): Is he the one you dealt with in this transaction?

A. Yes, all the way through.

Q. When was the first time after September 1st, 1945 that you talked with Mr. Norman Wuchner concerning the payments required under this contract.

Mr. Bearman: I would like to have that question read.

(The reporter read the question.)

Mr. Bearman: I object to the question on the grounds that it is incompetent, irrelevant and immaterial, and it is calling for the conclusion of this witness; and the further ground that it is clearly shown here that the parties to this contract and to this controversy are Jennie Wuchner and Charles E. Hill and Mrs. Hill, and the other would be hearsay insofar as it would affect Mrs. Hill, that is, insofar as whatever Mr. Wuchner did.

The Referee: The objection is overruled. She may answer that question.

(Question read by reporter.)

A. I don't know the exact date, but it was around the latter part of September, 1945.

Q. Where were you at the time you talked to him?

A. I was at the shop.

Q. Mr. Norman Wuchner came to the shop, did he?

A. Yes, frequently.

Q. Who else was present at that time?

(Testimony of Dora M. Hill.)

A. I don't recall anybody else being present.

Q. What time of day was it?

A. I imagine it was in the afternoon, but I can't say for sure that it was in the afternoon.

Q. What was said by you, and what was said by Mr. Norman Wuchner, concerning the subject matter of payments on this contract?

Mr. Bearman: I object to the question on the ground that no foundation has been laid, and any testimony offered here by her would not affect the rights of Mrs. Jennie Wuchner. It is hearsay.

The Referee: There is no showing that Mr. Norman Wuchner was authorized to speak for his mother. I think the objection is good.

Mr. Gendel: She testified that all of the dealings of the Hills in this transaction were with Mr. Norman Wuchner, and Mrs. Wuchner would be bound by that, just the same as by Mr. Bearman's transactions in this matter.

The Referee: In order to save time I will let the evidence go in and then determine its legal affect, whether or not it is binding on the seller and Mr. Hill. The objection is overruled.

Mr. Gendel: I think, in view of the objection, that I would like to back up just a bit to the extent of getting in a little more of the background as to Mr. Norman Wuchman's dealings here.

The Referee: Go ahead.

Q. Were you with Mr. Hill when the original sale was negotiated?

A. No, but I knew about it.

(Testimony of Dora M. Hill.)

Q. Were you present at any time when Mr. Hill was working with the Wuchners on the transaction of the purchase of this property?

Mr. Bearman: She said she knew about it, and unless she was there—(interrupted).

Mr. Gendel: That is what I asked her, if she was present when Mr. Hill was working on the transaction.

The Referee: Let her answer the question, whether she was there.

A. Yes, and I knew all about it, all about the sale, and I talked with both of them and I was present when they talked over the sale.

Q. Was Mrs. Jennie Wuchner a party to any of these discussions with Mr. Hill?

Mr. Bearman: I object to the question on the grounds that it is incompetent, irrelevant and immaterial.

The Referee: Objection overruled.

A. At no time.

Q. At any time did Mrs. Jennie Wuchner take part in the collection of these payments?

Mr. Bearman: The same objection.

A. No.

Q. How were these collections actually paid?

A. By checks to Norman Wuchner, and they were made out in his name.

Q. Did he come down to the plant to collect the payments? A. Yes, always.

(Testimony of Dora M. Hill.)

Q. That is what happened so far as the payments were concerned that were actually made?

A. Yes, that is right.

Q. Tell us what was said in the conversation in the latter part of September, 1945 concerning these payments?

Mr. Bearman: May I record the same objections to all of this line of testimony; incompetent, irrelevant and immaterial and not binding upon Mrs. Wuchner, and no foundation laid, your Honor.

The Referee: Overruled. Proceed.

Mr. Bearman: That is not the proper way to show agency, and it is purely hearsay.

The Referee: Overruled. Answer the question.

Mr. Gendel: Did you understand the question?

The Witness: I think so.

Mr. Gendel: Just answer the question, which is: What did you say and what did Mr. Norman Wuchner say on the subject of payments on this contract?

A. Well, Mr. Gendel, I don't recall talking to him about payments in September, 1945.

Q. When was the first time you talked to him about the subject matter of payments on this contract?

A. It must have been in October, when the next payment was due. I am pretty sure that is when it was.

Q. When and where did that conversation take place?

(Testimony of Dora M. Hill.)

A. All the conversations about it took place in the office of the shop there.

Mr. Bearman: I move to strike the answer that "all the conversations about it took place in the office of the shop."

The Referee: The motion is denied. Proceed.

Q. About what time in the month of October, 1945, did you have your first conversation concerning the subject matter of payments on this contract?

A. I would say around the middle of the month of October.

Q. About the middle of October, 1945?

A. Yes, it was about that time. I couldn't say the exact date for sure.

Q. That is your best recollection now, is it?

A. Yes, it is.

Q. And was that at the shop?

A. Yes, in the office down at the shop.

Q. Do you recall whether or not anybody else was present there at that time? A. No.

Q. Do you recall what time of day it was?

A. No, I don't.

Q. What was said by you and what was said by Mr. Norman Wuchner at that time on the subject matter of payments on this contract?

Mr. Bearman: Now, when was that, Mr. Gendel?

Mr. Gendel: In the middle of October, 1945.

The Witness: What was said then?

Mr. Gendel: Yes. Can you give us the general conversation, please?

(Testimony of Dora M. Hill.)

A. Well, as much as I recall now I mentioned that I might be late with the payments then, because I was kind of upset by everything else that had happened; and he told me not to worry about it.

Q. Do you recall just what he said about it?

A. Yes, I do. He said: "Don't worry; we can work something out; I am not interested in having all of the money at one time, I want the interest on it over a time for my mother's income."

Q. Is that the substance of what was said at that time? A. Yes.

Q. When was it discussed the next time?

A. I don't know. He was there practically every day, or just about every day. It is hard to say what day it was.

Q. It is now your testimony that this type of conversation took place several times after October, 1945?

Mr. Bearman: I object to that as leading and suggestive.

The Referee: Sustained. Proceed.

Mr. Gendel: I don't know what is leading and suggestive about it.

The Referee: By your putting the words in her mouth in your question. Proceed.

Q. Well, how often did you have a conversation with Mr. Norman Wuchner concerning the matter of payments on the sales contract after the first conversation you have testified about or testified to which you say was around the middle of October, 1945?

(Testimony of Dora M. Hill.)

A. It would be hard to say, because I saw him so much and so many times, and I couldn't state definitely and tell the truth about it.

Q. Did it ever happen after the middle of October, 1945?

A. Yes, up until the first of the year when I closed the shop.

Mr. Bearman: I don't think he should word his questions that way.

The Referee: Proceed.

Q. When was the next occasion that you recall after the middle of October, 1945, that you had on the subject matter of payments on the contract?

A. I just can't state dates, because I don't remember what dates they were. When you see somebody every day you can't say which particular date a certain thing was said.

Q. (By the Referee): Try it this way, Mrs. Hill: There were some notices given in this matter in February, 1946, what was the last time before any of those notices were given that you had a conversation with Mr. Norman Wuchner?

A. It was before the first of the year; I know that.

Q. You have no recollection of having any conversation with him since that?

A. None that I recall.

Q. How long before January 1st, 1946, was it that you had your last conversation with Mr. Norman Wuchner?

(Testimony of Dora M. Hill.)

A. It was just a week before Christmas, was the last time I talked to Mr. Norman Wuchner before January 1st.

The Referee: Go ahead, Mr. Gendel.

Q. (By Mr. Gendel): On this last occasion that you had a conversation with Mr. Norman Wuchner, what did he say to you about the payments.

A. He didn't say anything about payments then. He was talking about fixing the roof and fixing the building, and we had laid a foundation in the back and he was talking about building a building on that.

Q. Other than what you have just told us when was the last time you had a conversation with Mr. Norman Wuchner involving the subject matter of making payments on the contract?

A. There wasn't any conversation about it after (pause)—well, it would be after the meeting in October when I talked to him. I talked to him several times but he never did press me in any way about the payments; and I told him about the circumstances I was in, and he knew about that.

Q. (By the Referee): What did you tell him about your circumstances?

A. I didn't really tell him anything about them, because he knew all about them.

Mr. Bearman: I move that the answer be stricken out.

Q. (By the Referee): Did anything unusual occur in your family in the latter part of September, 1945?

(Testimony of Dora M. Hill.)

A. Yes—and do I have to go through with that again?

Q. (By the Referee): Well, I am sorry. However I think that it may or may not be material, and no matter how distressing it may be to you I think we should get it into the record. What did happen?

(Witness began crying, inaudibly.)

Mr. Bearman: I was going to say I will be glad to stipulate as to that and cover it by stipulation.

The Referee: Can you stipulate that in the latter part of September, 1945, he was arrested, that is, Mr. Hill was arrested?

Mr. Poyet: Yes, he was arrested, tried and I think the conclusion of the trial was in December, 1940; I think it was December 24th, 1945, and sentence was passed by Judge Fricke on January 8th, 1946.

The Referee: But when did it start?

The Witness: September 23rd was when he was arrested.

The Referee: Was he incarcerated?

Mr. Poyet: Yes, and charged with a felony.

The Referee: Is that stipulated?

Mr. Poyet: Yes.

Mr. Gendel: Yes, so stipulated.

Mr. Bearman: So stipulated.

The Referee: The only important thing left is whether or not Mr. Norman Wuchner had any knowledge of that situation, and if so, when he ascertained such knowledge.

(Testimony of Dora M. Hill.)

Mr. Bearman: I don't know anything about that.

Mr. Poyet: It was in the newspapers.

The Referee: That wouldn't help us any.

Mr. Gendel: I think Mr. Bearman will find that if there are any of the members of the family here they knew about it.

Mr. Bearman: I know there was some sort of difficulty that Mr. Hill was involved in, but I don't know anything about the details, and I think that possibly this will cover Mr. Gendel's inquiry, that is, that Mr. Hill was involved in something and he was charged with a felony, and that all of the residents of the particular locality where Mr. Wuchner lived and where Mr. and Mrs. Hill lived knew of this particular thing.

Mr. Gendel: Did you say including Mr. Norman Wuchner?

Mr. Bearman: I think so.

The Referee: All right; is that sufficient?

Mr. Poyet: And that by reason of that fact Mr. and Mrs. Hill were compelled to make immediate financial arrangements to raise money.

Mr. Bearman: That is not necessary.

The Referee: No.

Mr. Bearman: And I move to strike that out.

The Referee: Yes, that may go out.

Mr. Gendel: So stipulated.

Q. (By the Referee): Mrs. Hill, you testified that shortly before Christmas of 1945, Mr. Norman Wuchner was on the premises in question here and

(Testimony of Dora M. Hill.)

that you had some conversation with him in the course of such things as putting on a roof; can you recall that conversation more specifically as to what was said by the two of you?

A. Well, not much, except he did mention about putting up the walls for a new building on the back where the new station is; and I knew he had been working on the roof, he had a man working on it.

The Referee: I am confused about that. I thought we had a contract here where Mr. Hill was buying this property from Mrs. Wuchner, and now they are talking about making improvements on it.

Mr. Bearman: Yes, just like if you had a home in Los Felis Heights and I was going to put certain improvements on it——

Mr. Gendel: I don't think that is material. There is no question about possession here.

Mr. Bearman: No, but I think your Honor's observation is a good one.

Q. (By the Referee): I want to ask you, Mrs. Hill, after your husband entered into this contract and went into possession of this property did he start to make some improvements on it and put up a building? A. Yes.

Q. How far along did he go with that?

A. We had the excavation work in, and there was a cement floor and a foundation laid of twenty-five feet by something, I don't know just the area, but it was kind of an odd shape, on the back of the building there.

(Testimony of Dora M. Hill.)

Q. How far did he get with it—your husband?

A. Just the foundation and the floor.

Q. What was it intended for?

A. There was an automatic screw machine in there and we were going to move that out so we could have room for something else on the inside there.

Q. Did Mr. Wuchner do any of that work on the new small building? A. No.

Q. He didn't?

A. No; we did all of it.

Q. I thought you said he had done something there.

A. No, not on that; but after he found out I was in difficulty he turned about and started putting a new building up, there.

Q. But he never did cause any work to be done on this new building you mentioned?

A. No, he didn't.

Q. And he didn't do any work on it himself?

A. No.

The Referee: Any further questions, gentlemen?

Mr. Gendel: None by the Trustee.

Mr. Bearman: No questions. Now, your Honor, at this particular time I move to strike all of the answers and all of the testimony that has been offered by this witness concerning Norman Wuchner, on the ground that insofar as Jennie Wuchner, who is the plaintiff in the action that I have referred to, and is the same person involved in this particular action, that it is in no way binding on her,

and that there has been no testimony offered showing an agency or any right on the part of Norman Wuchner to bind Mrs. Jennie Wuchner.

The Referee: No; I think your motion should be denied, because I think these conversations with Mr. Norman Wuchner are a part of all the circumstances surrounding the case. The question of whether or not they are binding on Mrs. Wuchner is a legal question for the Court to decide from all of the evidence. Is there anything further?

Mr. Gendel: The Trustee rests.

Mr. Bearman: I think we have no questions.

The Referee: Is there anything further? (No response.) You say that you are all through, Mr. Gendel?

Mr. Gendel: Yes, your Honor.

The Referee: Mr. Poyet, have you any evidence?

Mr. Poyet: We have no further evidence, your Honor.

The Referee: Mr. Bearman?

Mr. Bearman: We rest, your Honor.

* * * * *

[Endorsed]: No. 11878. United States Circuit Court of Appeals for the Ninth Circuit. Jennie Wuchner, Appellant, vs. George T. Goggin, Trustee in Bankruptcy of the Estate of Charles E. Hill, Doing Business as Hill Machine Tools, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed March 8, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

Circuit Court of the United States
for the Ninth Circuit

No. 11878

In the Matter of
CHARLES E. HILL, dba HILL MACHINE
TOOLS, No. 44347-W,

Bankrupt.

JENNIE WUCHNER,

Appellant,

vs.

GEORGE T. GOGGIN, Trustee,

Appellee.

POINTS TO BE RELIED UPON BY
APPELLANT ON APPEAL

Point I.

In a real estate contract of sale where time is made essential and payment is to be made not later

than a specified date the forfeiture resulting from not making such payment is completed on that date.

Point II.

An intention to forego or abandon a right is an essential element of waiver.

Point III.

Waiver, if relied upon, must be pleaded and proved.

Point IV.

Before any party to an obligation can require another party to perform, he must first show that he has performed all conditions precedent required of him by the contract.

Point V.

An offer of performance must be made by debtor, or by some person on his behalf and must be free from any condition which creditor is not bound on his part to perform, and debtor must be able and willing to so perform.

Point VI.

That when a contract for sale of real estate provides that a violation of any of its terms or conditions shall work a forfeiture, it means that all rights of the party violating it shall cease but it remains in force to protect the rights of the innocent party and to enforce obligations of the delinquent.

Point VII.

The Bankruptcy Court was without jurisdiction to try this matter in a summary proceeding as there were two actions pending in the State Court

involving the same property and the same parties at the time Petition in Bankruptcy was filed.

Point VIII.

Trustee never acquired possession of this property, actual or constructive. Bankrupt's rights had been forfeited and any possession claimed by him or by the trustee was without any legal right and at most was that of a trespasser. Bankruptcy Court does not have jurisdiction over property of a stranger to the proceedings where trustee does not have actual or constructive possession.

Point IX.

That the order of the Referee and the Findings of Fact and Conclusions of Law entered by him and the order of the United States District Judge confirming said Order and Findings of Fact and Conclusions of Law are contrary to the evidence not supported by the evidence and that said Findings of Fact and Conclusions of Law and said Order are illegal, unconstitutional and improper and not in accord with the law and facts in this case.

Respectfully submitted,

WILLIAM W. BEARMAN,

RAYMOND B. McCONLOGUE.

By /s/ R. B. McCONLOGUE,

Attorneys for Appellant.

[Affidavit of service by mail attached.]

[Endorsed]: Filed March 8, 1948.

